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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LYDIA B. CHAMPION, *et al.*,

Petitioners,

v.

GEORGE DEUKMEJIAN, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Does California's "compulsory union dues" law violate the First and Fourteenth Amendments insofar as it forces contributions from nonmember civil servants' salaries to advance an employee organization's political and ideological activities affecting interests unobtainable in collective bargaining?

Does California's "compulsory union dues" law violate the First and Fourteenth Amendments insofar as it:

(a) delegates to a union an unfettered governmental power to decide the amount and purposes of nonconsensual deductions from nonmember civil servants' salaries; and,

(b) imposes a union-designed and -controlled rebate system as the means of satisfying the nonmembers' right to due process of law?

Do the decisions of this Court in the area of union security require the lower courts to withhold remedies sought under 42 U.S.C. § 1983 until final judgment?

LIST OF PARTIES TO THE PROCEEDING AS REQUIRED BY SUP. CT. R. 21.1(b)

LYDIA B. CHAMPION, PATRICIA J. DUCEY, DOROTHY C. HAYS, ERNIE LAZAR, ROBIN L. MILTON, GEORGE M. PEAIRS, NANCY SOUSA, CERES C. SPILMAN, ANITA TATRO, RITA VALDEZ, ROBIN E. WOOLSEY, CHARLOTTE P. WYLDE, ARTHUR R. ARGLEBEN, VICTORIA BALDWIN, and M. MARK GALLO.

CALIFORNIA STATE EMPLOYEES ASSOCIATION, GEORGE DEUKMEJIAN, EDMUND G. BROWN, JR., DENNIS BATCHELDER, ALAN GOLDSTEIN, KENNETH CORY, LEO MAYER, and CHARLES P. VALDES.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING AS REQUIRED BY SUP. CT. R. 21.1(b) ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Background Facts 4

B. Proceedings Below 6

REASONS FOR GRANTING THE WRIT 8

1. Conflict With the Decisions and Constitutional Principles Enunciated by This Court 12

2. Conflict With the Decisions of the Seventh Circuit and Supreme Judicial Court of Massachusetts, and with the Due Process Decisions of this Court. 15

TABLE OF CONTENTS continued

Page

3. The Court of Appeals' Treatment and Result Raises Substantial Questions of Constitutional Remedies..... 18

CONCLUSION 22

TABLE OF AUTHORITIES

Cases *Page*

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) ..... *passim*

Allee v. Medrano, 416 U.S. 802 (1974) 17

Blount v. Rizzi, 400 U.S. 410 (1971) 16

Bolger v. Youngs Drug Products Corp., 103 S. Ct. 2875 (1983) 13

Brown v. Hartlage, 456 U.S. 45 (1982) 15

Buckley v. Valeo, 424 U.S. 1 (1976) 15

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 20

City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) 9, 21

Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975) 21

Den v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1856) 16

Ellis v. BRAC, 104 S. Ct. 1883 (1984) 12, 16, 18

TABLE OF AUTHORITIES-continued

Page

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 15, 21

Fuentes v. Shevin, 407 U.S. 67 (1972) 18, 19

Hudson v. Chicago Teachers Union, 743 F.2d 1187 (7th Cir. 1984) 8, 16, 17

Hudson v. Palmer, 104 S. Ct. 3194 (1984) 19

IAM v. Street, 367 U.S. 740 (1961) 13

Lamont v. Postmaster General, 381 U.S. 301 (1965) 15

Maher v. Roe, 432 U.S. 464 (1977) 21

Mathews v. Eldridge, 424 U.S. 319 (1976) 19

Members of City Council v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984) 8

Monroe v. Pape, 365 U.S. 167 (1961) 12

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 20

NLRB v. Magnavox Co., 415 U.S. 322 (1974) 21

TABLE OF AUTHORITIES-continued

Page

Pacific Legal Foundation v. Brown, 29 Cal. 3d 168, 172 Cal. Rptr. 487 (1981) 4

Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C. Cir. 1969) 14

Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984) 12, 20

Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984), *petition for writ of certiorari pending*, No. 84-920 ..... *passim*

Schneider v. Smith, 390 U.S. 17 (1968) 15

Schneider v. State of New Jersey, 308 U.S. 147 (1939) 15

School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70 (1982) 17

Secretary of State of Maryland v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984) 11

Speiser v. Randal, 357 U.S. 513 (1958) 15

Sports Form v. U.P.I., 686 F.2d 750 (9th Cir. 1982) 7

TABLE OF AUTHORITIES-continued

Page

Township of West Windsor v. PERC, 78 N.J. 98 (1978) 4

United States v. Robel, 389 U.S. 258 (1967) 15

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 21

Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) 18

Watkins v. United States, 354 U.S. 178 (1957) 15

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 11

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 16

Constitutional Provisions and Statutes

United States Constitution

First Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

28 U.S.C. § 1254(1) 2

TABLE OF AUTHORITIES-continued

Page

42 U.S.C. § 1983 ..... *passim*

California Constitution, Article VII 4

California Government Code § 3513(j) 5

§ 3515.7 ..... 2, 5

§ 3515.8 ..... *passim*

New Jersey Statutes Annotated 34:13A-5.5(c) 17

Law Review Articles

Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156 (1974) 21

Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5 (1980) 16

No. _____

IN THE

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OCTOBER TERM, 1984

LYDIA B. CHAMPION, *et al.*,

Petitioners,

v

GEORGE DEUKMEJIAN, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

---

Lydia B. Champion, *et al.* (plaintiffs and petitioners) pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion and order of the District Court, entered on September 30, 1983, has not been officially reported (2a).[1] The opinion and order of the United States Court of Appeals for the Ninth Circuit entered

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[1] References herein to "a" pages are to pages in the Appendix to this petition.

on July 30, 1984, is reported at 738 F.2d 1082 (27a).

JURISDICTION

On September 26, 1984 the Ninth Circuit denied a timely Petition for Rehearing En Banc (38a). This Petition for Writ of Certiorari was filed within the required 90 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the U.S. Constitution's First Amendment protections to rights of speech, petition and association and Fourteenth Amendment guarantees of equal protection and due process of the law. It invokes remedies for violation of these rights pursuant to 42 U.S.C. § 1983. It challenges the January 1, 1983 amendment, Government Code §§ 3515.7 and 3515.8 to the California State Employer-Employee Relations Act, Government Code §§ 3512 through 3524. The verbatim text of these constitutional and statutory provisions with the implementing agreement between the governor and employee organization are presented at 42a through 48a.

The pertinent provisions of the 1983 amendment are:

> § 3515.7(b) The state employer shall furnish the recognized employee organization with sufficient

employment data to allow the organization to calculate membership fees and the appropriate fair share fees, and shall deduct the amount specified by the recognized employee organization from the salary or wages of every employee. . . . These fees shall be remitted monthly to the recognized employee organization. . . . The state employer shall not be liable in any action by a state employee seeking recovery of, or damages for, improper use or calculation of fair share fees.

§ 3515.8 Any state employee who pays a fair share fee shall have the right to demand and receive from the recognized employee organization, under procedures established by the recognized employee organization, a return of any part of that fee paid . . . which represents the employee's additional pro rata share of expenditures by the recognized employee organization that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment. . . . The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in . . . conditions of employment in addition to those secured through meeting and conferring with the state employer. The board may compel . . . return . . . of a fair share fee [portion] which the board may determine to be subject to refund under the provisions of this section. 45a-46a.

STATEMENT OF THE CASE

1. Background Facts

In 1977 the California legislature enacted the State Employer-Employee Relations Act to establish an employee's right to bargain collectively with the state employer. The legislature provided a mechanism for recognizing an employee organization as the exclusive representative of an employee unit. It obligated the state employer and unit representative to meet and confer in a process of negotiation to reach a written agreement on terms and conditions of employment. *Pacific Legal Foundation v. Brown*, 29 Cal. 3d 168, 174, 177-79, 172 Cal. Rptr. 487, 489, 491-92 (1981). Because of the mandate of Article VII of the California Constitution, the legislature limited the "scope of representation" and retained control over many terms and conditions of state employment. The legislature thus excluded such subject matter from the collective bargaining process for determination through the political process. *Pacific Legal*, 29 Cal. 3d at 177-79, 188, 172 Cal. Rptr. at 491-92, 498.[2] All employees had the right to refuse to participate or join in supporting any activity of employee organizations.

In mid-1982 the California State Employees Association (CSEA) submitted, and lobbied effectively for,

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[2] There are many similarities between the instant case and *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984). *Compare Township of West Windsor v. PERC*, 78 N.J. 98, 111-15 (1978) cited in *Robinson v. New Jersey*, Petition for a Writ of Certiorari, No. 84-920 at 5, October Term, 1984.

a bill to "remove the right of an employee to refuse to participate in the activities of employee organizations."[3] Senate Bill 1419, Legislative Counsel's Digest. Enacted January 1, 1983, the statute requires the state to "deduct the amount specified by the recognized employee organization from the salary" of nonmembers and to remit it to the organization. 45a, § 3515.7(b). The statute sets deductions from nonmembers' salaries at a limit of the organization's membership dues and general assessments. 43a, § 3513(j). The law permits the nonmember to demand a return of his share of deductions that the organization expended "in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment.'[4] The statute specifically excludes from refund such share of monies the organization expended for lobbying activities designed either to foster its policy goals in collective negotiation or to secure advantages in conditions of

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[3] During 1982 CSEA also opposed or introduced 48 other pieces of legislation covering such subject matter as: civil service reform, taxation on health care service plans, managerial benefits, housing mortgages, prisoners' work, realty investment, changes to the bargaining process, bank and corporate tax, and personal service contracting. It contributed 553,308 dollars to political action committees (PACs) mostly of legislators who advanced CSEA's state legislative positions. Between January and March 1983 CSEA introduced 28 pieces of legislation, expended 68,653 dollars in costs and 123,519 dollars in contributions over 2,500 dollars to influence the passage or defeat of legislation, and gave 140,909 dollars to various PACs. Appellant's Excerpts of Record at 315-71.

[4] CSEA's directors set the amount of dues and fee deductions to fund partisan political causes (PACs) but provide the nonmember a refund at the end of the year when rebates are calculated. CSEA Gress Affidavit at 18, ¶ 15. The statute also requires that the rebate include amounts expended for members' only benefits. Rather than rebate such amounts covering members' life insurance policies and scholarship funds, CSEA claims that it reduces the amount taken from nonmembers' salaries by one dollar per month.

employment outside the collective bargaining process. 46a, § 3515.8.

Petitioners are fifteen civil servants in bargaining units represented by CSEA. At the start of the nonconsensual deductions from their salaries, Petitioners notified the state and CSEA that they opposed deductions for purposes other than reimbursing CSEA's required contract work and demanded proof that collections were to satisfy only those purposes. The state responded that California law authorized deductions in such amounts as were "set by the union" and that the entire matter was between CSEA and the individual employee.[5] Three months later CSEA responded that under Code § 3515.8 it must rebate only amounts taken for its PACs and would do so following the December 31 close of the fiscal year. Petitioners then filed this civil rights action and moved simultaneously for class certification and preliminary relief. Deductions continue.

2. Proceedings Below

Petitioners' motion for preliminary relief claimed that the statute mandated systematic, nonconsensual deductions from nonmembers' salaries to advance a union's political and ideological positions, including legislative ones. Petitioners charged that, while operating under the guise of "fair share" fee regulation, the statute deprived

[5] The statute declares the "state employer shall not be liable in any action . . . for improper use or calculation of fair share fees." § 3515.8. However, in its response the state referenced the Memorandum of Understanding (MOU) which provides "conflicts between the union and employee relative to deduction of agency fee shall not be subject to grievance and arbitration." MOU ¶ 10m.

them of property, associational and due process rights based on their "nonmember" status and on a legislative preference for the subject matter of a union's expressive activities. Petitioners asserted that the state abdicated its constitutional duty to afford procedures adequate to protect the individual citizen's and public's interests at risk in the statutory scheme. Petitioners claimed that the nonmembers' rights to advocate chosen ideas and to due process of law, and the public's interest in democratic political processes, were irreparably injured by continual deductions to finance union political and ideological causes.

The District Court denied preliminary relief. Although it found that the statute clearly and facially infringed First Amendment rights, 8a-13a, and caused irreparable injury, 19a, the District Court held that the union's rebate was the prescribed and acceptable remedy, 14a-15a, 19a-20a. Because the rebate was the process of law to which Petitioners are entitled, 19a, the District Court reasoned that no rights were unconstitutionally lost in the forced subsidy of political causes, and that the temporary loss of mere income would not justify injunctive relief.

The Court of Appeals reviewed the District Court's action under the standard whether "the court misapprehends the law with respect to the underlying issues in litigation," *Sports Form v. U.P.I.*, 686 F.2d 750, 752 (9th Cir. 1982). 30a. It then decided that under this Court's opinions Petitioners were "entitled to no relief until final judgment in their favor is entered." 32a.[6] The Court of

[6] The Court of Appeals relied upon precedents which had rejected "as applied"

Appeals rationalized the compulsory support objective of section 3515.8 for union ideological and political activity on the grounds that a great variety of laws affect public employment and that, therefore, unions must have "broad authority to protect their members' interests before the legislature." The Court of Appeals found that the legislature had implicitly extended the concept of collective bargaining to embrace such union activity of a political or ideological nature relevant to subject matters of member interest. 35a-36a. Relying upon this Court's approval of the "bare authorization" of compulsory fee agreements in the public sector, the Court of Appeals held the instant statute does not abridge employees' First Amendment or due process rights. 33a.[7] It did not address the equal protection issue.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with this Court's purpose to preserve inviolate our democratic system of

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constitutional challenges to agency shop agreements authorized by valid statutes facially neutral, or silent, as to restrictions on First Amendment freedoms. In such challenges this Court typically limits its analysis "to the concrete case before" it. *Members of City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2127-28 (1984). In private sector agency fee cases this Court denied the power which unions claimed under the authorizing statute and found the complainant's injury caused by private abuse. Consequently, this Court vacated broad injunctions which lower courts issued against operation of agreements following the law. No previous agency fee case in this Court involved a facial challenge, due process or equal protection issues, nonconsensual deductions, or 42 U.S.C. § 1983 remedies.

[7] In its treatment of challenges to a similar statutory scheme the Court of Appeals for the Third Circuit concluded that the public employees were also not entitled to injunctive relief. *See Robinson*, 741 F.2d at 608-15. The Seventh Circuit decided differently in *Hudson, infra.*

government "whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political [and ideological] concern." *Abood v. Detroit Board of Education*, 431 U.S. 209, 243 (1977) (Rehnquist, J., concurring). In numerous decisions this Court has struck down attempts to restrict or shift, substantively or procedurally, the individual's power to advocate, oppose, or refrain, from the advancement of issues in the arenas of public debate. The Court has emphasized repeatedly that full First Amendment protections do not depend on the subject matter of speech or the status of the speaker. The Court has never permitted government to restrict the fundamental rights of one group of citizens in order to advance the interests of another.

In *Abood* and *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) the Court manifestly rejected the notion that the application of these principles might yield to government's interest to regulate the statutory right of employees to bargain collectively with a government employer. If these constitutional guarantees mean anything, it can hardly be doubted that they have their fullest and most urgent application precisely to the conduct of this case. The freedoms of petition and association would prove empty guarantees if, as the Court of Appeals would have it, a citizen's control over the decision to engage in political, lobbying and ideological activities could be delegated to another, or bargained away.

In the present case the Court of Appeals reviewed a

request to secure fundamental rights from irrevocable loss. It reviewed an operating statute that requires a government employer regularly to deduct involuntary support from employees' salaries in amounts decided solely by the union to fund its political causes "only incidentally related" to employment. This system leaves the individual with the diminished capacity to pursue an annual rebate through a statutorily imposed process designed and dominated by a self-interested union. The scheme thus mandates unbridled discretion in a private person to determine the fundamental interests of another. The Court of Appeals decided that Petitioners were entitled to no relief until final judgment. It reached this conclusion without independent review of the record facts or scrutiny of the regulation. It found its action compelled by this Court's decisions in various "as applied" challenges to agency-shop *agreements*.

It is inconceivable that, in *Abood* or other agency-shop cases, this Court envisioned either the result or treatment of this case. In shaping protections of fundamental rights this Court has repeatedly directed appellate courts independently to determine the facts and to scrutinize the regulation to insure that its legitimate thrust impacts in the least restrictive manner upon fundamental rights. The Court has also prescribed an analytical model for due process claims which the Court of Appeals apparently rejected in favor of a conclusive presumption that the decision in *Abood* sanctioned this legislature's conduct. If the federal statutory and common law rules of procedure, and the congressional authorization in

42 U.S.C. § 1983 have any salutary purpose, it is, undoubtedly, to prevent the arbitrary and irreparable loss of Fourteenth Amendment rights and consequential harm to the public interests which they safeguard. The conclusion of the Court of Appeals cannot stand as law.

If a state could shield its legislation affecting fundamental interests from meaningful judicial scrutiny and response by delegating its authority to private persons or affixing presumptively safe labels to its statutes, the Fourteenth Amendment would be rendered meaningless. The Court of Appeals refused to vindicate society's interest in these guarantees or to protect petitioners from inevitable and irreparable loss. Because the Court of Appeals found its action fully justified by this Court's decisions, this Court should exercise its supervisory jurisdiction to resolve the important questions of constitutional remedies raised in the disparity between the salutary purpose of section 1983 and its misapplication here.

The decision below cannot be squared with the text of the Constitution, the decisions of this Court, or with common sense. The First Amendment, and the Equal Protection and Due Process Clauses of the Constitution place "[o]ne's right to free speech," petition and association beyond the reach of majorities and legislatures. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). These fundamental laws are of general application[8]

[8] The First and Fourteenth Amendments' provisions often serve to protect significant societal interests broader than those of the parties seeking their vindication. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2852 n.13 (1984).

and their text requires the Court of Appeals to discharge its special obligation to protect those rights from sacrifice to political expediency. *Monroe v. Pape*, 365 U.S. 167, 182-84 (1961). The Court of Appeals' decision and treatment of this case thus endangers the very principles of political and ideological liberty this Court sought to preserve in *Abood*.

1. The Court of Appeals misunderstood this Court's decision in *Abood* and misapplied it to produce a result completely at odds with the principles of that and other pertinent cases. This Court faced two claims in *Abood*. The first claim challenged the bare power of a legislature to require public employees to contribute to a union that bargained with a government employer. *Id.* at 211, 213. The Court approved a requirement to support a union in its capacity as an exclusive representative and for the "commercial purposes of engaging in collective bargaining" with the employer. *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3260 (1984) (O'Connor, J., concurring). It held that a legislature may authorize an agency fee agreement insofar as it "required every employee in the unit to pay a service fee to defray the costs of [carrying out the statutory duties of] collective bargaining, contract administration and grievance adjustment." *Ellis v. BRAC*, 104 S. Ct. 1883, 1892, 1896 (1984).

The second claim sought injunctive relief specifically against "the Union's *spending* a part of [the] required service fees" for activities and programs that were political or ideological in nature. *Abood*, 431 U.S. at 211, 213, 234.[9] Respecting such uses for purposes outside the context

[9] The Court of Appeals cites to *Abood*, 232, for the holding "that union

of contract negotiations with the employer, this Court found the employees' rights entitled to the full constitutional protections afforded expressive activity.[10] *Id.* at 235-36. *See also, e.g., Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2880-81 (1983). A unanimous Court thus recognized that the state's interest in regulation of the employees' statutory right to bargain with their employer did not justify regulation of other rights or means of communication. The Court held that government could not, consistently with the Constitution, require one to advance a union's political views or its ideological causes. *Abood* at 235-36.

Examining problems in *Abood* similar to those present-

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security arrangements in public employment do not abridge employee First Amendment or Due Process rights." There is no support for that proposition at 232 or elsewhere. The concrete case put no "Due Process" claim into controversy. Inferentially the Court's note at 227 n.23 may concern the duty of government under the due process clause but this idea hardly supports the Court of Appeals' action or reasoning. In *Abood*'s remedial context the Court did express significant concern for protection of the employee's right to withhold support. *Id* at 241-64.

[10] The constitutional issue arose from a separate statutory authorization permitting unions to engage in lobbying activities. But the agency fee agreement and Michigan statute, *Abood* at 212, 214 n.7, were facially neutral: did not aim at political or ideological activity, nor compel support on the basis of union memberships' viewpoints, nor license the Public Employment Relations Board to administer the law on the basis of such constitutionally impermissible criteria. Compare Cal. Code § 3515.8. However, the Michigan statute did not limit the nonmembers' contribution to a proportionate share of collective bargaining costs. The state court acknowledged the well-recognized political activities of unions and the fact "that Michigan law also permits union expenditures for legislative lobbying." *Abood* at 215. It concluded, therefore, that the legislature sanctioned the use of compulsory fees for purposes other than collective bargaining. *Id.* at 215, 232. Consequently, this Court had to face the "as applied" claims it had been able to avoid in *IAM v. Street*, 367 U.S. 740, 744 n.2, 768-71.

ed here, this Court targeted a remedial objective "to devise a way of preventing compulsory subsidization of ideological activity," in order to avoid the dubious choice to relinquish either one's "right to withhold" support or "freedom to maintain [one's] own beliefs." 431 U.S. at 241; *id.*, 244 (Stevens, J., concurring).[11] Its intent was "to protect a democratic system whose proper functioning is indispensably dependent on the *unfettered* judgment of each citizen on matters of political [and ideological] concern." *Id.* at 243 (Rehnquist, J., concurring). Accordingly, this case presents a substantial question as to the constitutionality of a statute which features incarnate the evils denounced by this Court in *Abood.*

The Court of Appeals interpreted the decision in *Abood* to mean that a federal court is precluded from deciding that any "agency fee" legislation violates the First and Fourteenth Amendments. No judge below understood that the approval of service fees in *Abood* was a general one and was not meant as approval for any particular substantive restriction. Indeed, in that very case a unanimous Court held that the state action in application of an agreement violated the plaintiffs' rights.

The Court of Appeals also erroneously held that the exercise of its duty under 42 U.S.C. § 1983 must await final judgment. 32a-33a. That decision cannot be reconciled with the purpose of the Civil Rights Act or equitable principles. *See, e.g., Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969). The Court

[11] *Abood* came to the Court on appeal of an order dismissing the complaint for failure to state a claim upon which relief can be granted. *Id.*, 213 n.4, 236-37.

of Appeals has, in fact, sanctioned a scheme that in purpose and necessary effect violates that constitutional "preserve where the views of the individual are made inviolate"[12] and where the legislature must take steps to assure "respect for constitutional liberties."[13] The Court of Appeals' action is clearly error of federal constitutional magnitude.

2. The due process questions presented by this petition are substantial and warrant the attention of this Court. The decision below authorizes a legislature to impose a union-controlled rebate upon the property and liberty interests of employees who choose not to asso-

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[12] *Schneider v. Smith*, 390 U.S. 17, 25-26 (1968) (the Bill of Rights preserves the dignity of the individual to order his own political will). This Court has repeatedly rejected as too facile an approach that looks no further than the general power of government. *Schneider v. State of New Jersey*, 308 U.S. 147, 161 (1939) ("mere legislative preferences . . . are insufficient to justify such [regulation] as diminishes the exercise of rights so vital to the maintenance of democratic institutions.") It required "[e]ach regulation . . . be examined in terms of its potential impact upon fundamental rights, the importance of the end sought and the necessity of the means adopted." *United States v. Robel*, 389 U.S. 258, 270-71 (1967) (Brennan, J., concurring). Subsequently, the Court voided government attempts to disable freedom of choice either by "prohibition" or "inhibition." *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring). The Court struck down attempts to restrict people's will to expend monies to advance public policies, ideas, or legislation. *Buckley v. Valeo*, 424 U.S. 1, 48-51 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Brown v. Hartlage*, 456 U.S. 45, 58-60 (1982).

[13] *Watkins v. United States*, 354 U.S. 178, 205 (1957) (the duty is to prevent the existence of a "wide gulf between the responsibility for the use of . . . power and the actual exercise of that power.") When fundamental interests are at stake this Court held procedural protections essential to avoid that gulf. *Speiser v. Randal*, 357 U.S. 513 (1958). The legislature's responsibility is especially acute in the area where the lines are finely drawn between speech unconditionally guaranteed and speech

ciate with the union. That decision directly conflicts with decisions of the Seventh Circuit and Supreme Judicial Court of Massachusetts. It also conflicts with this Court's decision in *Ellis* rejecting "rebate" even as a remedy for a statutory violation. The Court of Appeals' analysis and application of the controlling constitutional principles are at odds with decisions of this Court.

Shortly after the decision below, the Court of Appeals for the Third Circuit similarly reached its conclusion in *Robinson*. An awareness of prevailing First Amendment principles, however, led the Seventh Circuit to a contrary conclusion in *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1194 (1984). In that appeal from denial of injunctive relief sought under section 1983, Judge Posner found this Court's decisions required government-controlled procedures to "make reasonably sure" that employees' wages are not taken involuntarily "to support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological." *Id.* He also held that a union rebate does not satisfy government's duty under the Fourteenth Amendment. Contrary to the Ninth and Third Circuits, the Seventh Circuit held that a union's unilateral decision to escrow involuntary collections does not moot the question of injunctive relief. *Id.* at

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legitimately regulated. *Blount v. Rizzi*, 400 U.S. 410, 417 (1971). Because procedure "marks much of the difference between rule of law and rule by fiat," *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971), the legislature is not "free to make any process 'due process of law.'" *Den v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856). It is not just the individual, but organized society as a whole, that is wronged by failure to afford the right to due process. *See* Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 44 (1980).

1196-97.[14]

In agreement with the Seventh Circuit the Supreme Judicial Court of Massachusetts followed this Court's decisions to conclude that any presumption of validity of a fee runs "afoul of the constitutional requirement that the organization bear the burden of proving the assessed fee legitimate." *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 76-82 (1982). It concluded that this burden of proof is only meaningful if the organization is required to prove the assessment's validity before a neutral, government tribunal subject to judicial review. *Id.* at 82. It reasoned that a statutory requirement to use an internal union procedure would render that statute suspect on First Amendment grounds "without adequately countervailing legislative justification." *Id.* at 79. As did the Seventh Circuit, this well-regarded state court found government's interest was to facilitate payment of a "permissible fee" with appropriate regard for the employees' right to engage in their own activities. *Id.* at 83-84. *Hudson*, 743 F.2d at 1192. These issues will surely arise elsewhere. This petition should be granted to resolve the conflicting application of principles with profound effects upon public employees' rights.

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[14] A union's "voluntary" decision at the onset of, or during litigation, to provide a precollection reduction under its own idea of the legal purpose and amounts of such fees does not cure a statute which, like section 3515.8 here, or NJSA 34:13A-5.5(c) in *Robinson*, *supra*, stands as express authority for providing only postcollection "refunds" under a doubtful standard. To the extent it provides that authority it must be held unconstitutional and its operation enjoined. CSEA's newly "evolving" remedy of today, 36a, may tomorrow become nothing more than history. *See Allee v. Medrano*, 416 U.S. 802, 810-11 (1974). Constitutional rights are not compensable by money nor is the public interest in

3. In *Ellis* this Court reversed the Ninth Circuit's faulty ruling that a union's rebate system might satisfy either constitutional or statutory concerns. 104 S. Ct. at 1889-90. Although that decision came in the context of a remedy for statutory violations, it is apparent that no member of this Court would impose union policies as constituting due process of law. Union officers are not answerable or responsive to the people but rather to their own membership. Under our system of government these bodies are not endowed with authority to decide whether property or liberty interests will be deprived. Because the objective of due process is to adequately inform the decisions of government, it is inconceivable how a union refund procedure might satisfy that objective.

Indeed, the focus here is the state's conduct, whether action or inaction, that gives rise to the constitutional attack. That conduct takes the concrete form of a statutory enactment and government operations which Petitioners stressed "abdicate[d] effective state control over state power." *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972). And, this conduct goes further than the statutes scrutinized and held invalid in the *Fuentes* line of cases. Not only has the California legislature removed even nominal supervision, it has also authorized a private party to exercise a governmental power with far more significance than the power exercised in those cases involving commercial disputes. Thus, the concern here must be with the very function of government implicated by delegation of power to a private group where serious potential for self-serving action is created. *See, e.g., Washington ex*

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their scrupulous observance rebatable.

rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121-22 (1928). Such power to restrict, or indeed to bar competition in a field of ideas so vitally connected with the public welfare may not constitutionally be placed in the hands of a private organization which acts to promote its own special interests. It is to official bodies that society looks to implement the central concept of due process. In this instance since the state is in a position to provide predeprivation process, the Constitution and decisions of this Court require it do so. *Hudson v. Palmer*, 104 S. Ct. 3194, 3204 (1984).

A. The Court of Appeals failed to follow the analytical framework this Court prescribed for determining the "specific dictates of due process." *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Had it not, it would have found Petitioners' interest in procedures self-evident. Their interests in property and in statutory and fundamental liberty may be lost irrevocably. An improper deduction "works a uniquely final deprivation." And, under a system controlled by the union and a broad standard, the risk of an erroneous deprivation is substantial.[15] Most importantly the loss of the opportunity for an effective hearing is unrecoverable. The deprivation of due process is, therefore, irreparable. *Fuentes*, 407 U.S. at 82. To defer relief until final judgment permits an action affecting fundamental interests to escape due process guarantees. The decisions of this Court should not be read to dignify that result.

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[15] CSEA admits it does not know, and declares that it would be an "extremely time-consuming and difficult," and "unwarranted" task to ascertain the amounts spent in collective bargaining activities with the state. CSEA Response to Interrogatories Nos. 12, 13 & 14.

B. The Court of Appeals assumed a broad justification for the statute. It never addressed the values of the rights impacted or nature of the restrictions imposed by the statutory scheme. With deeply troubling parallels to the Third Circuit's treatment of the *Robinson* case, it applied *Abood* to foreclose investigation. As previously noted, such treatment raises significant constitutional questions for it allows a legislature, by statutory labels, to shield its conduct from review.

In cases raising First Amendment issues, an appellate court has an obligation to independently examine the record in order to make sure that the judgment does not support a forbidden intrusion on the field of free expression. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933-34 (1982). The analytical framework for that examination is well known. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981) (regulation of First Amendment rights is always subject to exacting review). "The constitutional inquiry is not qualified by any analysis of governmental interests." *Roberts*, 104 S. Ct. at 3260. In every aspect of its charge the Court of Appeals disregarded this Court's clear rules. Significantly, it avoids the necessary inquiry through its "understanding that collective bargaining in the public sector requires resort to the legislature on various employment related questions." 35a.[16] That purpose,

[16] As footnote 3 might indicate, CSEA provided an organized pressure group to present grievances in public forums long before the instant statute. As citizens, its members did and continue to advance their interests in the area of public employment. But law, not contract, emerges from this process. It is not a "good faith" negotiation between parties. The legislature's accountability and duty is to all citizens under the Constitution. It must act unilaterally to discharge that duty. The people's rela-

however, hardly justifies transfer of the individual's will to the policymaking power of a private group.

This Court has squarely rejected just such effort to distort the focus of collective bargaining in order to restrict core First Amendment freedoms. *Madison Joint School District*, 429 U.S. at 174-76 & n.10; *see also, Bellotti*, 435 U.S. at 777 nn.11-13, 785. The "criterion" for the Court's distinctions is "not the *terminology* used by the legislature or the courts but the *process* used by the parties." C. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156 (1974) (emphasis added). It would be a mournful day for democracy were the state able to bargain away the citizen's rights or its duties under the Constitution. Nor may "the exacting scrutiny required by the First Amendment" be reduced by the state's focus on money. *Bellotti*, 786 n.23. To the contrary, "constitutional concerns" are at their greatest here for this case involves the state's attempt to impose its will by force of law." *Maher v. Roe*, 432 U.S. 464, 476 (1977).

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tionship to it is not through negotiation. This process is not collective bargaining and the Ninth Circuit, or Third Circuit, cannot make it so. It is no different in the private sector, *Abood*, 431 U.S. at 232, although the decision in *Robinson*, 741 F.2d at 607, 609, holds differently. As with any other person, union memberships are bound by law and may influence government through the political process to change it. Historically, pertinent state and federal laws, including any statutory restrictions on the scope of negotiable matters, enter into and form part of the contract process and terms. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977). Private sector unions are no less constrained by these laws than others. *See NLRB v. Magnavox Co.*, 415 U.S. 322 (1974); *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975).

CONCLUSION

For the above stated reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A-1

Memorandum of Decision and Order of the United States District Court, Central District of California, September 30, 1983.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LYDIA B. CHAMPION, *et al.*, *Plaintiffs,*	)	NO. CV 83-2598-LTL (Gx)
vs.	)	**MEMORANDUM OF DECISION AND ORDER**
STATE OF CALIFORNIA, *et al.*, *Defendants.*	)	September 30, 1984

This matter is here on plaintiffs' motions for a preliminary injunction and for certification of classes, and on certain defendants' motion for abstention. For the reasons stated below, all three motions are denied.

The civil rights action challenging the constitutionality of the January 1, 1983 amendments to the California State Employer-Employee Relations Act ("SEERA") was filed on April 26, 1983. The amendments allow the state and unions representing state employees to enter into bargaining agreements which include provisions requiring that non-union employees in the bargaining unit pay "fair share fees" to the unions through involuntary, automatic payroll deductions. Objecting non-union employees can obtain a refund of their pro rata share of union expenditures for political activities. The refund, however, does not include the pro rata share of "costs of support

of lobbying activities designed to foster policy goals and [sic] collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours and other conditions of employment in addition to those secured through meeting and conferring with the state employer." Cal. Govt. Code § 3515.8. Refunds can be obtained "under procedures established by the recognized employee organization." *Id.*

Plaintiffs are fifteen members of bargaining units represented by defendant California State Employees Association ("CSEA") who are subject to automatic deductions of their fair share fees pursuant to a bargaining agreement entered into between CSEA and the State of California. Defendants are Governor Deukmejian and Michael Frost (Frost, Director of the Department of Personnel Administration, was substituted as a party in place of original defendant Dennis Batchelder), Jerry Brown and Alan Goldstein (predecessors of Deukmejian and Frost), Controller Kenneth Cory, and CSEA and its past and current presidents (Leo Mayer and Charles Valdes). Defendant State of California has been dismissed from the action with prejudice.

The first cause of action, pursuant to 42 U.S.C. § 1983, alleges that plaintiffs have been deprived of their constitutional rights in five respects:

(1) Plaintiffs are compelled to finance expenditures not directly related to collective bargaining, contract administration and grievance adjustment, in violation of their First Amendment speech and associational rights;

(2) Plaintiffs are forced to wait up to one year and

more before receiving their refunds for political expenditures, again in violation of their First Amendment rights;

(3) Plaintiffs are deprived of due process of law because they have no right to any hearing prior to taking of their property via the automatic payroll deductions;

(4) Plaintiffs are denied equal protection of the laws since they are subjected to automatic payroll deductions, whereas CSEA members are subjected to payroll deductions only if they authorize such deductions in writing; and

(5) All other unions which entered into fair share fee agreements with the state were not entitled to automatic payroll deductions until they certified either (1) that 50% of the bargaining unit employees were union members, or (2) that a majority of the bargaining unit employees had voted for automatic deductions. In violation of plaintiffs' equal protection rights CSEA was not subjected to this requirement, even though only 47% of the bargaining unit employees represented by CSEA were CSEA members at the time the agreement went into effect.

The second cause of action alleges that SEERA is unconstitutional on its face and as applied under the First and Fourteenth Amendments and under Article I, Sections 2 and 7 of the California Constitution, for the reasons listed above. The third cause of action alleges that the state and CSEA failed to comply with the notice and public hearing requirements of SEERA prior to entering into the fair share fee agreement.

Jurisdiction over the first and second causes of action is proper under 28 U.S.C. §§ 1343 and 1331. Jurisdiction

over the third cause of action is pendent.

Plaintiffs seek to represent two classes. With respect to the First Amendment claims plaintiffs seek to represent bargaining unit employees who have not joined CSEA and who object to use of their fair share fees even temporarily for purposes or activities other than collective bargaining, contract administration and grievance adjustment. With respect to the equal protection and due process claims plaintiffs seek to represent all employees in CSEA-represented bargaining units subject to the fair share fee agreement.

Plaintiffs seek a declaratory judgment that SEERA is null and void on its face and/or as applied under the United States and California Constitutions. A similar declaration is sought as to the state-CSEA fair share agreement. A declaration that the agreement is null and void is also sought on grounds that it was entered into before compliance with the notice and public hearing requirements of SEERA. A preliminary injunction is sought enjoining the public defendants from deducting fair share fees and enjoining the private defendants from receiving or retaining fair share fees. A permanent injunction is sought enjoining violations of plaintiffs' constitutional rights and compelling the return of unlawful deductions for fair share fees. Finally, plaintiffs seek attorney's fees and damages including exemplary damages.

I. DEFENDANTS' MOTION FOR ABSTENTION

As stated earlier, Cal. Govt. Code § 3515.8 entitles state employees who pay a fair share fee to demand a

return of that portion of their fee used to finance expenditures "in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment." The refund, however, is not to include the employee's share of expenditures for certain generally-described lobbying activities.

Plaintiffs contend that the decision in *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977), limits the use of fair share fees collected from objecting employees to expenditures "for the purposes of collective bargaining, contract administration, and grievance adjustment." 431 U.S., at 225-26. Thus, according to plaintiffs, to the extent that Cal. Govt. Code § 3515.8 provides that plaintiffs cannot obtain a refund covering their pro rata share of expenditures for lobbying activities, that section is unconstitutional on its face. Plaintiffs also seek to mount an "as applied" attack on the statute. Defendants contest this position, and argue on this motion that because of ambiguity in the language of § 3515.8 state court construction of the statute could eliminate the need to address plaintiffs' constitutional challenges. Defendants thus contend that this case is appropriate for "Pullman abstention."

To determine the appropriateness of abstention under *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496 (1941), the Ninth Circuit has set forth criteria which must be met before abstention is proper:

> (1) the complaint must touch a sensitive area of social policy into which the federal courts should not enter unless there is no alternative to adjudica-

> ication; (2) a definitive ruling on the state issue by a state court could obviate the need for constitutional adjudication by the federal court; and (3) the proper resolution of the possibly determinative state law issue is uncertain.

Richardson v. *Koshiba,* 693 F.2d 911, 915 (9th Cir. 1982) See also *Manney* v. *Cabell,* 654 F.2d 1280, 1283 (9th Cir. 1980), *cert. denied,* 455 U.S. 1000 (1982); *Canton* v. *Spokane School District No. 81,* 498 F.2d 840, 845 (9th Cir. 1974). The second prong of the above test, however, would appear to be an incomplete statement of the law. Abstention is proper not only where a ruling on the state issue obviates the need for constitutional adjudication, but also where the constitutional issue might be presented "in a different posture" by a state court determination. *County of Alleghany* v. *Frank Mashuda Co.,* 360 U.S. 185, 189 (1959); *Babbitt* v. *Farm Workers,* 442 U.S. 289, 306 (1979).

Where the three above criteria are met, abstention is appropriate "in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Harmon* v. *Forssenius,* 380 U.S. 528, 534 (1965). In *Pullman* itself the Court spoke of exercising "'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Pullman, supra,* at 501. The Ninth Circuit cautions, however, that abstention is only reluctantly applied in civil rights cases alleging constitutional violations. *Richardson supra,* at

917, n.17; *Manney, supra,* at 1284; *Stephens* v. *Tielsch,* 502 F.2d 1360, 1362 (9th Cir. 1974).

While we conclude that the first criteria for *Pullman* abstention has been met here, we find that defendants have failed to satisfy the second and the third criteria. As plaintiffs note, their constitutional argument is that *no* lobbying activities may be financed by the collection of fair share fees from objecting non-union employees. Since *some* lobbying activities must be found by state courts to be permissibly financed through the compelled collection of fair share fees, no matter how narrowly § 3515.8 is construed, no definitive state court ruling could obviate the need for constitutional adjudication. Of course, state courts theoretically could find that all of CSEA's lobbying activities do not fall within the "lobbying activities proviso," a finding which would eliminate the need to decide the constitutional issues. As will be discussed below, however, this is not a realistic possibility.

The *Affidavit of Kenneth C. Murch*, Operations Division Administrator for CSEA, discusses many of the lobbying activities which CSEA engages in:

> During the January to July period the CSEA legislative staff is working with the Assembly and Senate Fiscal Committees to ensure that funds are available for state employee salaries and benefits . . . The legislative staff is also busy fighting off the constant flow of new bills that would take away existing rights or benefits the state employees enjoy.

> Some samples of such bills that CSEA successfully opposed are those that would provide lower retirement benefits for future employees and allow for expanded contracting-out of government work to the private sector, thus threatening state employee jobs.

Murch Affidavit, ¶ 9, p. 7-8.

In order for *Pullman* abstention to be proper, application of SEERA to expenditures for such lobbying activities must be doubtful and uncertain. Although it is true that no California court has yet construed § 3515.8, this court would be creating a dispute where none legitimately exists if it found that the permissibility of these expenditures was doubtful. Lobbying for funds in the state budget to pay employee salaries could not be found to be impermissible under the statute without severely straining the language of the statute allowing expenditures for "lobbying activities designed to foster policy goals and [sic] collective negotiations." Similarly, lobbying for legislation directly geared to providing benefits for state employees or all employees would seem to squarely fall within the broad protection of lobbying expenditures "to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer."

Accordingly, defendants have failed to satisfy either the second or the third prong of the *Pullman* test. While the language of the statute is far from unambiguous, no reasonable resolution of the ambiguities could eliminate the constitutional questions here presented. Nor have

defendants shown that application of the lobbying activities proviso to defendants' lobbying activities is uncertain. Even assuming that some such activities would be found to be impermissible, since it is clear that many others are permissible abstention is improper. Cf. *Canton* v. *Spokane School District #81,* 498 F.2d 840, 846 (9th Cir. 1974).

II. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

1. *Standards on preliminary injunction motions*

It is well established in the Ninth Circuit that "[a] preliminary injunction should be granted only if the movant can show either: (1) probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in the movant's favor." *Glacier Park Foundation* v. *Watt,* 663 F.2d 882, 884 (9th Cir. 1981); see also *Miss Universe* v. *Flesher,* 605 F.2d 1130, 1134 (9th Cir. 1979); *Wm. Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.,* 526 F.2d 86, 88 (9th Cir. 1975). Recent cases have made it clear, however, that these are not really two entirely separate tests, but that they are merely extremes of a single continuum. *Benda* v. *Grand Lodge of International Association of Machinists,* 584 F.2d 308, 314-15 (9th Cir. 1978).

2. *The merits*

a. Use of fair share fees to finance lobbying activities

Citing language in *Abood, supra,* plaintiffs contend that fair share fees may only be expended "for the pur-

poses of collective bargaining, contract administration, and grievance adjustment." 431 U.S., at 225-26. The Ninth Circuit, which this court is bound to follow, has explicitly rejected this position. *Ellis* v. *Broth. of Ry., Airline & S.S. Clerks,* 685 F.2d 1065, 1072 (9th Cir. 1982), *cert. granted,* 51 U.S.L.W. 3746 (April 19, 1983). The standard which this court must apply is "whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining." *Id.* The *Ellis* standard has subsequently been applied by another Ninth Circuit panel. *Assoc. Bldrs. & Contractors* v. *Carpenters Vac., Etc.,* 700 F.2d 1269, 1275 (9th Cir. 1983). The question presented, then, is whether lobbying activities are "germane to the union's work in the realm of collective bargaining."

The *Ellis* court did not address this issue, although the district court in *Ellis* found, without explanation, that lobbying expenditures were impermissible under the Railway Labor Act. *Ellis* v. *Railway Clerks,* 91 LRRM 2339 (S.D. Ca. 1976). The only decision directly on point is *Robinson* v. *State of New Jersey,* 547 F.Supp. 1297 (D. N.J. 1982), which construed a New Jersey statute identical to Cal. Govt. Code § 3515.8. The *Robinson* court recognized that at least some lobbying expenditures would be permissible under *Abood,* citing the following language in *Abood*:

> The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriation decisions might be seen as an integral part of the bargaining process.

Abood, supra, at 236, *quoted in, Robinson, supra,* at 1316. The *Robinson* court noted, however, that the statute went beyond allowing lobbying expenditures designed "to secure for the employees represented advantages in wages, hours, and other conditions of employment *in addition to those secured through collective negotiations with the public employer.*" *Robinson, supra,* at 1316. [Emphasis in original.] These lobbying expenditures the court found could not be constitutionally financed through compelled representation fees. Judge Debevoise cited state statutes covering areas such as job security and seniority, and noted that "[t]here are very deep political and ideological differences of opinion as to the merits of these statutes." 547 F.Supp., at 1317.

Given the Ninth Circuit standard for evaluating the permissibility of specific union expenditures, the *Robinson* holding is not particularly persuasive. So long as lobbying activities are "germane to the union's work in the realm of collective bargaining," it would not seem to matter whether there are "very deep political and ideological differences of opinion" as to the merits of the statutes being lobbied. The critical inquiry with respect to lobbying on issues of job security and seniority is whether

the "realm of collective bargaining" includes all subjects traditionally subject to collective bargaining, or only those subjects which the state legislature permits public employee unions to bargain over. This court need not resolve the issue, however, since it appears clear that CSEA engages in other lobbying activities impermissible under the *Ellis* standard but permissible under Cal. Govt. Code § 3515.8.

The *Murch Affidavit* admits that CSEA lobbying activities extend to "subjects affecting all employees, e.g., Workers Compensation, Unemployment Insurance, and Cal-OSHA." *Murch Affidavit,* ¶ 19, p. 13. ln. 18-20. These activities would appear permissible under § 3515.8 as "lobbying activities designed . . . to secure for the employees represented advantages in wages, hours and *other conditions of employment* in addition to those secured through [collective bargaining.]" [Emphasis supplied.] By no stretch of the imagination, however, can such lobbying activity be considered germane or related to work in the realm of collective bargaining. Such areas are administered by state agencies rather than by employers, and are traditionally not the subject of collective bargaining. Indeed, the only agreement that private sector unions and employers could reach in these areas would be an agreement to jointly petition the legislature for changes. Plaintiffs have thus demonstrated probable success in establishing that at least some of CSEA's lobbying expenditures cannot be financed by collection of fair share fees.

b. The demand and return refund system—First Amendment concerns

§ 3515.8 provides that any state employee paying fair share fees "shall have the right to demand and receive . . . under procedures established by the [union]" a refund of the employee's pro rata share of impermissible expenditures. Plaintiffs contend that this system is unconstitutional, although they admit that the decision in *Ellis, supra,* "would appear to direct a contrary result to that urged by Plaintiffs." In *Ellis* the plaintiffs contended that the "demand and return" system was constitutionally insufficient "because it allows the union to collect and retain the full amount of a protesting employees' [*sic*] dues, use part of the dues for objectionable purposes, but not pay the rebate until the following year." 685 F.2d, at 1069. This is the same argument that plaintiffs here make. The Ninth Circuit has rejected the argument, however, stating that it is "meritless." *Id.*

Plaintiffs do not attempt to distinguish *Ellis,* but urge this court to disregard it because the Supreme Court has granted certiorari and because the decision is purportedly wrong. This court, however, is bound to apply clearly controlling Ninth Circuit authority. Accordingly, at this point in time plaintiffs have not demonstrated either "probable success" or that "serious questions" are raised on this issue.

c. The demand and return refund system—due process concerns

Citing *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), plaintiffs argue that before the state may withhold fair share fees from their wages a hearing is required. In *Fuentes,* which involved summary seizure of personal property under a

writ of replevin, the Court stated that notice and an opportunity for a hearing is generally required constitutionally prior to depriving a person of "any significant property interest." 407 U.S. at 82; *Polar Shipping Ltd.* v. *Oriental Shipping Corp.*, 680 F.2d 627, 638 (9th Cir. 1982). As applied here, plaintiffs argue that they are entitled to a hearing before the state begins to withhold fair share fees from their paychecks. Let us assume, however, that plaintiffs were given such a hearing and established that portions of their fair share fees were being spent in violation of their First Amendment rights. Under *Ellis*, plaintiffs would not be entitled to any relief since the "demand and return" system was constitutional. A hearing, then, would be an academic exercise which would only determine how much money the claimants were entitled to at the end of the year. Under these circumstances a hearing would be pointless. It would be argued, of course, that while the "demand and return" system might be constitutionally sufficient to override First Amendment concerns, it is insufficient to override both First Amendment and due process concerns. Courts which have considered the issue from a First Amendment viewpoint, however, could not have been ignorant of the fact that property is involved.

It should also be noted that this case arises in a totally different context than *Fuentes*. This case involves a statutory scheme which allows uniform deductions from the paychecks of employees. The deductions are not based on the particular circumstances of the individual. *Fuentes*, on the other hand, involved resolution of debtor-creditor disputes solely on the word of the creditor. Both the existence of the debt and the amount of the debt could have

been in dispute. Here the existence of the debt is certain, and only the standard amount is challenged. This case might be analogized to tax cases where the IRS is permitted, without a prior hearing, to direct employers to withhold taxes even where exemptions are claimed. See *Stonecipher* v. *Bray*, 653 F.2d 398 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982), *citing*, *Phillips* v. *Commissioner*, 283 U.S. 589 (1931). While the court in *Fuentes* noted that *Phillips* involved a situation where it is essential that government needs be immediately satisfied, 407 U.S. at 92, n.24, and thus the tax cases could be distinguished as unique, the rationale of *Fuentes* does not seem compelling when applied to regular monthly withholdings that can be challenged eventually.

Although in light of *Ellis* the Court finds it hard to conclude that plaintiffs have demonstrated that they will probably succeed on this claim, the claim does appear to raise serious issues which need to be litigated.

d. Equal protection—CSEA members vs. non-CSEA members

Article III, Section 10(a) of the bargaining agreement provides that "[t]he State agrees to deduct and transmit to CSEA all deductions authorized on a form provided by CSEA and . . . to deduct and transmit to CSEA fair share fees of state employees who do not elect to be members of CSEA." Plaintiffs argue that this provision discriminates against them because they have not joined CSEA, since by the terms of the provision only non-CSEA employees are subject to automatic deductions. The *Affidavit of Gerald J. Gress*, Controller of CSEA, states that "CSEA has a written policy that requires all

members covered by collective bargaining agreements containing fair share fee provisions shall pay their dues by payroll deductions." *Gress Affidavit*, ¶ 8, ln. 9-12. The affidavit goes on to state that all civil service employees represented by CSEA, whether CSEA members or not, pay their dues or fair share fees by payroll deduction. Thus plaintiffs, even if they could establish that the agreement unconstitutionally discriminates against them vis-a-vis CSEA members, have not been injured by the alleged discrimination. A requirement that plaintiffs demonstrate some "injury in fact" is mandated by Article III of the Constitution. *Port of Astoria, Oregon* v. *Hodel*, 595 F.2d 467, 474 (9th Cir. 1979). Plaintiffs accordingly do not appear to have raised "serious questions" on this issue.

e. Equal protection—non-CSEA members vs. *non-members of other state employee unions*

Plaintiffs' final argument is that they are being discriminated against vis-a-vis non-union state employees in bargaining units represented by unions other than CSEA. Plaintiffs allege that other unions, prior to being entitled to have the state automatically deduct fair share fees, had to either hold an election on the issue or certify that more than 50% of the bargaining unit employees were union members. CSEA was not subject to this requirement.

If the "rational relationship" test is applied, equal protection is not violated so long as the classification is "rationally related to achievement of a legitimate state purpose." *Western & Southern L.I. Co.* v. *Bd. of Equalization*, 451 U.S. 648, 657 (1981). Defendants explain that the CSEA agreement does not contain the clause requir-

ing some form of majority showing because CSEA bargained for elimination of that clause by agreeing to forego its right to represent some 870 employees whom the state considered to be supervisory personnel. *Murch Affidavit*, ¶ 16, p. 10-11. Thus, the distinction between non-CSEA members and non-members of other public employee unions was drawn in order to achieve certain goals in state personnel practice. Since the agreement to forego the clause directly led to the achievement of the state's goals, the rational relationship test has been met.

Plaintiffs do not argue that the classification cannot satisfy the "rational relationship" test; rather, they argue that since First Amendment interests are implicated the "strict scrutiny" standard should apply. This standard, which requires the state to justify the classification as "*necessary* to promote a *compelling* governmental interest," *Dunn* v. *Blumstein*, 405 U.S. 330, 342 (1972) (emphasis in original), applies "when government action impinges upon a fundamental right protected by the Constitution." *Perry Education Assn.* v. *Perry Local Educators' Assn.*, ___ U.S. ___, 51 U.S.L.W. 4165, 4170 (February 23, 1983). Plaintiffs, however, oversimplify the matter. It is already settled by *Abood* that unions may constitutionally collect fair share fees, despite the First Amendment implications. What is at issue here is simply the question of whether non-union members may be required to pay those fees on their own or whether the state may perform the collection function by means of automatic payroll deductions. This mere choice of method does not implicate First Amendment rights or any other fundamental rights. Since no fundamental right is burdened, the strict scrutiny test is inapplicable. *Perry Education Assn., supra,* at 4170.

Plaintiffs may also be arguing that they are being discriminated against because they have chosen not to join CSEA, and that strict scrutiny is required because of this suspect classification. While this argument is a compelling one when applied to plaintiffs' other equal protection claim, it is incorrect when applied here. Plaintiffs are being treated differently than non-members of other state employee unions, who stand in the same shoes as plaintiffs with respect to First Amendment issues. The discrimination here is based upon the jobs plaintiffs hold, and thus the bargaining unit that they are in. We have found no authority holding that this type of discrimination involves a suspect classification. Accordingly, plaintiffs probably will not prevail upon this issue.

3. Irreparable injury/balance of hardships

a. Use of fair share fees to finance lobbying activities

As stated earlier, plaintiffs will probably succeed in establishing that at least some of the lobbying expenses incurred by CSEA may not be financed through the collection of fair share fees. Plaintiffs' First Amendment rights are thus being infringed. While it is true that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976), in the context of this case the Ninth Circuit has held that restitutionary remedies are acceptable. *Ellis, supra,* at 1069-70. In other words, even if defendants conceded that use of fair share fees to pay for lobbying expenditures was unconstitutional, the only remedy to which plaintiffs would be entitled would be a refund pursuant to the demand and return system. Since plaintiffs are only enti-

tled to this relief, a preliminary injunction enjoining defendants from collecting or expending any fair share fees is obviously improper.

b. The demand and return refund system—due process concerns

We also found that serious questions on the merits exist as to this issue. In order to determine whether a preliminary injunction is warranted, the court must evaluate whether the balance of hardships tips sharply in the movant's favor. In making this determination, it must be noted that First Amendment rights are not implicated by this issue. Rather, it is only plaintiff's property rights in the money withheld which concerns the court.

Viewed in this way, injunctive relief would appear improper. First, the temporary loss of income does not ususally [*sic*] constitute irreparable injury sufficient to justify preliminary injunctive relief. *Los Angeles Memorial Coliseum Com'n* v. *Nat. Football League,* 634 F.2d 1197, 1202 (9th Cir. 1980), *quoting, Sampson* v. *Murray,* 415 U.S. 61, 90 (1974). Plaintiffs do not contend that the money withheld creates any great financial hardship, or even that their ability to exercise First Amendment rights is actually, as opposed to theoretically, restricted. Indeed, the *Supplemental Affidavit of Gerald J. Gress* states that the refund checks for objecting employees' pro rata shares of political expenditures would be sent out by July 1, 1983 and that such shares would no longer be withheld as part of fair share fees for those objecting employees. The union, on the other hand, would be seriously harmed by an injunction against the collection of all fair share

fees. $4-4.7 million out of the union's $10.8 million budget for its Civil Services Division is collected as fair share fees. Enjoining collection of these fees would obviously have an effect on the union's ability to function, as detailed in both the Gress and Murch affidavits. Moreover, only $154,000 of the fair share fees collected are spent on lobbying activities. *Gress Affidavit,* ¶ 15-17, p. 10-12. If this court were to enjoin the collection of all fair share fees, plaintiffs would become free riders accepting the services of CSEA but refusing to contribute to any of its costs. Agency shop provisions have been found constitutional in order to avoid this result. The balance thus does not tip sharply in movant's favor, if indeed it tips in their favor at all.

III. PLAINTIFFS' MOTION FOR CERTIFICATION OF CLASSES

Rule 23(a), *Federal Rules of Civil Procedure,* sets out four prerequisites to maintenance of a class action lawsuit:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The decision to grant or deny class certification is within the trial court's discretion. *Yamamoto* v. *Omiya.* F.2d

1319, 1325 (9th Cir. 1977).

With respect to the "free speech" class plaintiffs seek to have certified, defendants contend that the third and fourth requirements have not been met. The typicality requirement is designed to assure that the interests of the named representatives are aligned with those of the class. *Jordan* v. *County of Los Angeles,* 669 F.2d 1311, 1321 (9th Cir. 1982), *vacated on other grounds,* ___ U.S. ___, 103 S.Ct. 35 (1983). The requirement is met where there is a nexus between the plaintiffs' injury and the injury suffered by the class—i.e., where the claim "stems from the same event, practice, or course of conduct that forms the basis of the class claims." *Id.* Here, in answers to interrogatories CSEA states that as of June 10, 1983 it had received 573 objections to "some uses by CSEA of portions of individual fair share fees." 39 of those objections, according to CSEA, are to "political, ideological and other non-collective bargaining activities," while the rest are to expenditures for "partisan political or ideological causes that are only incidentally related to the terms or conditions of [their] employment." Defendants contend that it would be improper for plaintiffs to represent this latter group, since they have not objected to use of their money for lobbying activities and thus plaintiffs' claims are not typical of theirs. Another Court has refused to certify a class on precisely these grounds. *Olsen* v. *Communications Workers of America,* CV 82-3443 (January 3, 1983). Judge Debevoise's conclusion appears correct, since non-union members who object to use of their money for political and ideological purposes may not object to use of their money for lobbying activities designed to obtain greater benefits for the employees.

Nevertheless, there are at least 39 members who defendants concede are properly in the class. The Ninth Circuit has indicated in dicta that it "would be inclined to find the numerosity requirement satisfied" by a class of 39. *Jordan, supra,* at 1319. The question thus becomes whether plaintiffs can adequately represent this class.

This requirement is met where "the named representative's attorney [is] qualified, experienced, and generally capable [of conducting] the litigation, and . . . the named representative's interests [are not] antagonistic to the interests of the class." *Jordan, supra,* at 1323. In this respect it must be noted that plaintiffs seek to have SEERA and its fair share fee requirements declared unconstitutional, and also seek to enjoin the collection of all fair share fees, not just those to be used for impermissible purposes. This relief is not necessarily consistent with the interests of those who might well not object to collection of fair fees to be used for collective bargaining purposes. This variance is not a *de minimus* one, since enjoining the collection of what might turn out to be a substantial portion of the union's budget (if the class were to grow) might well have an undesired effect on the union's ability to carry out its collective bargaining functions properly. Accordingly, the first class sought to be certified will not be certified.

As to the second class which plaintiffs seek to have certified, the words of Judge Debevoise seem particularly appropriate:

> As a practical matter, I see no need to designate a class of any sort at this time in order to achieve the ob-

> jectives which plaintiffs seek. The Federal questions involved can be resolved in the proceeding as it is now constituted. To the extent that these rulings withstand scrutiny on appeal, they will be binding on the defendants in this case and assuredly will be complied with in the future.

Olsen, supra.

Plaintiffs here raised two equal protection arguments aimed at enjoining the collection of fair share fees through payroll deductions. Apart from the problem that plaintiffs have made no showing that *any* members of the proposed class are interested in pursuing these claims (indeed, unlike the typical civil rights suit, the relief sought here is indeed a "mixed blessing" that might not be desired by the class), if this court holds that the State cannot (at this time) constitutionally deduct fair share fees from payroll checks, the ruling will extend to non-union employees. The same holds true if this court were to hold that the state could not withhold fair share fees without setting up some form of prior hearing mechanisum [*sic*]. Accordingly, there is little point in certifying the second class.

There is also a question as to whether plaintiffs here can adequately represent this second class. Again, antagonism between plaintiffs' interests and the interests of the class appear to exist. The interest of those allegedly injured by the equal protection violations would be, at most, to enjoin the collection of fair share fees by payroll deductions. Plaintiffs, on the other hand, seek to have this court enjoin the collection of fair share fees in any manner. There is no showing at all that the proposed class

has any actual or legitimate interest in this relief.

Accordingly, the motion for class certification is denied, as are the other two motions here considered. The denial of the motion for preliminary injunction is without prejudice to its renewal in the event review of *Ellis* by the Supreme Court justifies such renewal.

This *Memorandum of Decision* shall constitute those findings of fact and conclusions of law required by Rule 52, *Federal Rules of Civil Procedure.*

The Clerk of the Court will serve copies of this Memorandum of Decision and Order by United States mail upon counsel of record.

DATED: This 30th day of September, 1983.

/s/ Lawrence T. Lydick

Lawrence T. Lydick
United States District Judge

APPENDIX A-2

Opinion of the United States Court of Appeals for the Ninth Circuit, July 30, 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYDIA B. CHAMPION, *et al.*, *Plaintiffs/Appellants,* v. STATE OF CALIFORNIA, *et al.*, *Defendants/Appellees.*	)	No. 83-6315 DC No. CV 83-2598-LTL **OPINION** July 30, 1984

Appeal from the United States District Court
for the Central District of California
Lawrence T. Lydick, District Judge, Presiding

Argued and Submitted June 4, 1984

Before: WRIGHT, FERGUSON and REINHARDT,
Circuit Judges

FERGUSON, Circuit Judge:

The plaintiffs, Lydia Champion and fourteen other public employees, appeal the district court's denial of a preliminary injunction. They sought to enjoin their employer, the State of California, from deducting "fair share fees" from their paychecks and giving the money to their bargaining representative, the California State Employees Association (CSEA). In their underlying suit they challenge the propriety of the union's expenditures under *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977),

and *Ellis v. Brotherhood of Railway Clerks*, ___ U.S. ___, 104 S.Ct. 1883 (1984), and the constitutionality of the state law under which the deductions were made. We affirm.

FACTS

In 1982, effective January 1, 1983, the California legislature amended the State Employer-Employee Relations Act (SEERA) to provide that "[o]nce an employee organization is recognized as the exclusive representative of an appropriate unit, it may enter into an agreement with the state employer providing for organizational security in the form of maintenance of membership or fair share fee deduction." Cal. Gov't Code § 3515.7(a). The state employer is authorized to deduct a membership or fair share fee from the employee's salary or wages. *Id.* § 3515.7(b). The employee organization is required to keep "an adequate itemized record of its financial transactions" and to make available to the state Public Employment Relations Board and to the employees a "detailed, written financial report" annually. *Id.* § 3515.7(e).

The statute makes special provisions for "fair share fees," the fees paid by bargaining unit employees who choose not to become members of the employees' association or union. Although the state employer may deduct an amount to equal their "fair share" of the cost of representation and forward it to their representative, the employee has the right to demand and receive from the representative a return of any part of the fee which is spent "either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and

conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization." *Id.* § 3515.8. The statute further provides that the refund shall not reflect or include:

> the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer. The board may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section.

The first payroll deduction pursuant to these sections was made on February 1, 1983. All employees were notified of their right to object to and to demand a refund of money used for "partisan political or ideological causes." According to the defendants, since July 1, 1983, CSEA does not wait to refund money deducted from objecting employees' paychecks, but eliminates from the deduction the amount it determines is spent for political or ideological purposes.

Plaintiffs brought suit under 42 U.S.C. § 1983, challenging the constitutionality of sections 3515.7 & 3515.8 under the First and Fourteenth Amendments. Pending final resolution, plaintiffs sought a preliminary injunction restraining the deduction and collection of any portion of plaintiffs' wages as fair share fees.

The district court denied the plaintiffs' motion for a preliminary injunction and also denied plaintiffs' motion for class certification and defendants' motion to abstain. Only the denial of the preliminary injunction has been appealed.

ISSUES

1. Did the district court abuse its discretion in denying the preliminary injunction?

2. How does the Supreme Court's recent opinion in *Ellis v. Railway Clerks* affect the result?

DISCUSSION

Standard of Review

A grant or denial of a preliminary injunction will be reversed only if the district court relied on an erroneous legal premise or abused its discretion. *Sports Form, Inc. v. UPI, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). "To determine whether there has been an abuse of discretion, the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . .' " *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 US. 402, 416 (1971)).

The relevant factors ordinarily considered on a motion for a preliminary injunction are either (1) whether the probability of success on the merits and the possibility of irreparable harm justify an injunction, or (2) whether serious questions are raised and the balance of hardships

tips sharply in the movant's favor. *Sports Form, Inc.* 686 F.2d at 753 (and cases cited therein). The district court considered the proper legal factors in reviewing the motion for a preliminary injunction.

1. Did the District Court Abuse Its Discretion in Denying the Preliminary Injunction?

The plaintiffs concede that a state may deduct a "fair share fee" from state employees who are part of a bargaining unit but not members of the bargaining association. *Abood v. Detroit Board of Education, supra.* However, they assert that the scope of the fair share fee as defined in section 3515.8 is beyond the amount permissibly deductible from nonmember employees. The preliminary injunction they sought would have enjoined all deductions taken from the plaintiffs' paychecks pursuant to section 3515.7.

The district court's denial of this injunction is in accord with the Supreme Court's holdings in *Abood v. Detroit Board of Education, supra*; *Railway Clerks v. Allen,* 373 U.S. 113 (1963); *International Association of Machinists v. Street,* 367 U.S. 740 (1961); *Railway Employes' Department v. Hanson,* 351 U.S. 225 (1956). Although the district court conducted the analysis ordinarily applied on motions for preliminary relief, it is clear that under *Allen, Street* and *Abood* it would have been error to issue the preliminary injunction.

In a series of cases beginning with *Railway Employes' Department V. Hanson,* 351 U.S. 225 (1956), the Supreme Court has consistently upheld the constitutionality

of statutes authorizing a union shop and the compelled payment of "fair share fees" or dues to the employee representative. *Hanson* involved an attack on the facial constitutionality of section 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh. The Court upheld the statute as a valid legislative policy choice, and rejected the arguments that it violated the First Amendment or the Due Process Clause of the Fifth Amendment.

In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Court recognized that funds paid to the union by objecting employees, compelled pursuant to the Railway Labor Act, 45 U.S.C. § 152, Eleventh, could only be used for limited purposes. The Court held, however, that an injunction against all such compelled payments was unjustified. It said:

> Restraining the collection of all funds from the appellees [objecting employees] sweeps too broadly since their objection is only to the uses to which some of their money is put. Moreover, restraining collection of the funds . . . might well interfere with the appellant unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry.

367 U.S. at 771. In *Allen*, the Court was even more emphatic. It stated that "lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, *dissenting employees* (at least in the absence of special circumstances not shown here) *can be entitled to no relief until final judgment in their favor is entered.*" 373 U.S. at 120 (emphasis added). *See also Abood*, 431 U.S. at 241 ("For all the reasons outlined in

Street, the court was correct in denying the broad injunctive relief requested."); *Dean v. TWA,* 708 F.2d 486 (9th Cir.), *cert. denied,* 104 S.Ct. 490 (1983). In light of these opinions and the Court's holding in *Abood* that union security arrangements in public employment do not abridge employee First Amendment or Due Process rights, 431 U.S. at 232, the district court was correct in denying preliminary relief.

Even if a more narrow injunction could be fashioned under plaintiffs' motion, *see, Robinson v. State of New Jersey,* 547 F. Supp. 1297, 1323-24 (D.N.J. 1982), there do not appear to be any special circumstances rendering a preliminary injunction appropriate in this case. Defendants state that they have eliminated that portion of the fair share fee which goes to "partisan political or ideological causes only incidentally related to the terms and conditions of employment." Thus, the amount collected no longer includes amounts clearly subject to refund under the statute. Moreover, unlike the situation of *Robinson, supra,* there has been no argument or showing that CSEA's refund or accounting procedures are "unusable" or "onerous." 547 F. Supp. at 1323.

2. The Effect of the Supreme Court's Opinion in *Ellis v. Railway Clerks.*

Plaintiffs challenge the facial constitutionality of section 3515.8, particularly that portion which reserves to the employee representative the right to use fair share fees for certain lobbying activities. In *Ellis v. Railway Clerks,* ___ U.S. ___, 104 S.Ct. 1883 (1984), the Court, in considering challenges to several types of expenditures, stated:

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

104 S.Ct. at 1892. The Court did not consider lobbying expenditures in its opinion, although the district court in *Ellis* had found such expenditures impermissible. *Ellis v. Railway Clerks,* 91 LRRM 2339, 2342-43 (S.D. Cal. 1976). Nonetheless, the district court did not abuse its discretion in declining to issue a preliminary injunction on this limited basis. It correctly noted that in *Abood* the Court recognized that in public employment, as contrasted with private employment under the Railway Labor Act at issue in *Ellis,* the line between permissible and impermissible expenditures may be "somewhat hazier." The Court stated:

> The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriation decisions might be seen as an integral part of the bargaining process.

Abood, 431 U.S. at 236. The determination of whether

certain expenditures are proper depends on the nature of the bargaining process. *See Ellis,* 104 S.Ct. at 1892; *Abood,* 431 U.S. at 236 & n.33.

Section 3515.8 of SEERA, which plaintiffs challenge as impermissibly broad, is based on the understanding that collective bargaining in the public sector requires resort to the legislature on various employment-related questions. *See Abood,* 431 U.S. at 236. Section 3517.5 requires that the state employer-employee agreement, or memorandum of understanding, be presented "to the Legislature for determination." Cal. Gov't Code § 3517.5. The expenditure of funds required by the memorandum of understanding is dependent upon legislative approval, as is the implementation of other provisions which may be inconsistent with various state statutes. *See id.* § 3517.6.

Because public employees work for the state, matters which are ordinarily left to direct negotiation in the private sector are covered by statute. For example, grievance adjustment, Cal. Gov't Code § 18714; computation of leave when there is a break in service, *id.* § 19143; the policy of paying female workers on the principle of comparable worth to remedy great discrepancies between male and female workers' salaries, *id.* § 19827.2 (a); the notice and hearing procedure when an employee's salary is changed, *id.* § 19828; and the use of hourly or day workers, *id.* § 19830, are provided by statute, but may be changed through negotiation. See generally *id.* § 3517.6 for a list of statutes affecting public employees. These statutes create a status quo from which the bargaining representatives start negotiations for their particular units. The importance of legislation affecting public employment, enacted

in a forum apart from the meet-and-confer sessions authorized by statute, Cal. Gov't Code § 3517, requires that public employee representatives be given broad authority to protect their members' interests before the legislature.

The Court did reject one aspect of the Ninth Circuit decision in *Ellis*. This circuit had held that a rebate plan adequately protected the nonmembers' right to avoid contributing to objectionable political purposes. *Ellis v. Brotherhood of Railway Clerks,* 685 F.2d 1065, 1069 (9th Cir. 1982). The Supreme Court rejected this approach, holding that once the amount of unauthorized expenditures has been determined, that amount must be deducted from the fair share fee. It held that a rebate scheme does not adequately protect the nonconsenting employees' rights. *Ellis,* 104 S.Ct. at 1889-90.

The *Ellis* holding does not determine the validity of the California statute authorizing a fair share deduction nor the disposition of this appeal. In this case, we face the problems that *Allen* and *Street* recognized in considering broad preliminary relief. In contrast, *Ellis* was decided on a fully developed record and controls only the remedy after a final judgment on the merits. *See Allen,* 373 U.S. at 120. Moreover, as the rebate is a separate and distinct part of the California scheme, its invalidity should not affect the constitutionality of the statute as a whole. Nor would it affect any voluntarily adopted procedure such as CSEA has described whereunder the Association forgoes the initital collection of the amounts that it might otherwise be required to rebate under the statute.

CONCLUSION

The district court order denying the motion for a preliminary injunction is affirmed.

APPENDIX A-3

Order of the United States Court of Appeals, September 26, 1984, denying the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYDIA B. CHAMPION, *et al.*, *Plaintiffs/Appellants,*	)	No. 83-6315
	)	DC No. CV 83-2598-LTL
v.	)	Central California
STATE OF CALIFORNIA, *et al.*, *Defendants/Appellees.*	)	**ORDER**
	)	September 26, 1984

Before: WRIGHT, FERGUSON AND REINHARDT, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Ferguson and Reinhardt have voted to reject the suggestion for rehearing en banc, and Judge Wright would so recommend.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B-1

First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983

The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX B-2

Sections of the California State Employer-Employee Relations Act.

State Employer-Employee Relations Act

Sec. 3512. [Legislative purpose] It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment between the state and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employee-employer relations within the State of California by providing a uniform basis for recognizing the right of state employees to join organizations of their own choosing and be represented by such organizations in their employment relations with the state. It is further the purpose of this chapter, in order to foster peaceful employer-employee relations, to allow state employees to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to permit the exclusive representative to receive financial support from those employees who receive the benefits of this representation.

Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil service employees, including those designated as managerial and confidential, provided by Article VII of the California Constitution or by laws or rules enacted pursuant thereto. (As amended by Ch. 1572, L. 1982, effective January 1, 1983)

Sec. 3513. [Definitions] As used in this chapter:

(a) "Employee organization" means any organization which includes employees of the state and which has as one of its primary purposes representing these employees in their relations with the state.

(b) "Recognized employee organization" means an employee organization which has been recognized by the state as the exclusive representative of the employees in an appropriate unit.

* * *

(i) "State employer" or "employer," for the purposes of bargaining or meeting and conferring in good faith, means the Governor or his or her designated representatives.

* * *

(j) "Fair share fee" means the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization. (As amended by Ch. 1572, L. 1982, effective January 1, 1983)

Sec. 3515. [Organization; representation] Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (h) of Sec. 3513, or a fair share fee provision, as defined in subdivision (j) of Sec. 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state. (As amended by Ch. 1572, L. 1982, effective January 1, 1983)

* * *

Sec. 3515.5. [Exclusive representation] Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state.

* * *

Sec. 3515.7. [Organizational security agreements]

(a) Once an employee organization is recognized as

the exclusive representative of an appropriate unit it may enter into an agreement with the state employer providing for organizational security in the form of maintenance of membership or fair share fee deduction.

(b) The state employer shall furnish the recognized employee organization with sufficient employment data to allow the organization to calculate membership fees, and the appropriate fair share fees, and shall deduct the amount specified by the recognized employee organization from the salary or wages of every employee for the membership fee or the fair share fee. These fees shall be remitted monthly to the recognized employee organization along with an adequate itemized record of the deductions, including, if required by the recognized employee organization, machine readable data. Fair share fee deductions shall continue for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first. The Controller shall retain, from the fair share fee deduction, an amount equal to the cost of administering the provisions of this section. The state employer shall not be liable in any action by a state employee seeking recovery of, or damages for, improper use or calculation of fair share fees.

* * *

(e) Every recognized employee organization which has agreed to a fair share fee provision shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees in the unit, within 90 days after the end of its fiscal year, a detailed written financial report thereof in

the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or comparable officers. In the event of failure of compliance with this section, any employee in the unit may petition the board for an order compelling this compliance, or the board may issue a compliance order on its own motion.

* * *

Sec. 3515.8. [Fair share fees; pro rata share subject to refund] Any state employee who pays a fair share fee shall have the right to demand and receive from the recognized employee organization, under procedures established by the recognized employee organization, a return of any part of that fee paid by him or her which represents the employee's additional pro rata share of expenditures by the recognized employee organization that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization: The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in w[illegible]s, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer. The board may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section. (As added by Ch. 1572, L. 1982, effective January 1, 1983)

Sec. 3516. [Scope of representation] The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

Sec. 3516.5. [Notice of meet and confer] Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.

In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation. (Sec. 3516.5, as amended by Ch. 776, L. 1978)

Sec. 3517. [Good faith meet and confer] The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employ-

ment with representatives of recognized employee organizations and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that the Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

Sec. 3517.5. [Memorandum of understanding] If agreement is reached between the Governor and the recognized employee organization, they shall jointly prepare a written memorandum of such understanding which shall be presented, when appropriate, to the Legislature for determination.

APPENDIX B-3

Memorandum of Understanding between the State of California and the California State Employees Association

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This MOU sets forth the full and entire understanding of the parties regarding thee matters contained herein and supercedes Article III, Section 10 of agreements between the parties covering Units 1, 3, 4, 10, 11, 12, 14, 15, 17, and 20, covering the period July 1, 1982 through June 30, 1984.

ARTICLE III

10. Organizational Security

a. It is the intent of this Section to provide for payroll deductions, insofar as permitted by law, for the employees exclusively represented by CSEA. The State agrees to deduct and transmit to CSEA all deductions authorized on a form provided by CSEA and pursuant to Government Code Section 3515.7 to deduct and transmit to CSEA fair share fees of state employees who do not elect to be members of CSEA. These authorized deductions and fees shall be remitted monthly to CSEA along with an adequate itemized record of deductions including, if required by CSEA, machine readable data. CSEA shall incur any reasonable costs incurred by the State Controller for these deductions.

* * *

(2) The amount of membership dues and fair share fees shall be set by CSEA and changed by the State upon written notice from CSEA.

(3) CSEA agrees to indemnify, defend and hold the State harmless against any claims made of any nature and against any suit instituted against the State arising

from its checkoff of these deductions.

* * *

f. The State agrees to notify each new employee and each present employee upon the initial fair share fee deduction of the amount of the fair share fee and the employees' rights to a rebate of the portion used by CSEA for political contributions. The notice will be drafted by CSEA subject to approval by the State. Said notice will be placed in the employee payroll envelope at least once each year.

g. CSEA agrees that the amount of the fair share fee established by CSEA shall not include the pro-rata share of costs of any benefits available only to CSEA members.

* * *

MOTION FILED
JAN 10 1985

NO. 84-920
NO. 84-1010

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PAUL ROBINSON, ET AL.,
V.
STATE OF NEW JERSEY, ET AL.,
Petitioners,
Respondents.

LYDIA B. CHAMPION, ET AL.,
V.
GEORGE DEUKMEJIAN, ET AL.,
Petitioners,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF GRANT OF WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF v

BRIEF OF AMICUS CURIAE 1

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 3

I. THE DECISIONS BELOW CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS AND WITH THE DECISION OF A STATE COURT OF LAST RESORT, AS WELL AS WITH THE DECISIONS OF THIS COURT 4

II. THE HOLDING THAT PUBLIC EMPLOYEES MAY BE REQUIRED FINANCIALLY TO SUPPORT POLITICAL LOBBYING TO "FOSTER" UNION "POLICY GOALS" PRESENTS SUBSTANTIAL QUESTIONS, WITH GREAT PRACTICAL CONSEQUENCES NATIONWIDE 5

A. *The Holdings Below Conflict With the Policy Underlying This Court's Previous Decisions, Which Attempt to Eliminate "Free Riders" While Protecting Employees From Forced Support of "Political or Ideological" Speech* 5

B. *Despite the National Importance of the Issue, This Court has Not Yet Drawn a Clear Line Between Permissible and Impermissible Exactions From Public Employees* 7

C. These Cases Have Serious Implications for the Democratic Process, for the Rights of Citizens to a Republican Form of Government, and for the Freedom of Speech 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 4, 5, 6, 7

Champion v. California, 738 F.2d 1082 (9th Cir. 1984) passim

Ellis v. BRAC, 104 S.Ct. 1883 (1984) 4, 5, 6, 7

Elrod v. Burns, 427 U.S. 347 (1976) 11

Hudson v. Chicago Teacher's Union, 743 F.2d 1187 (7th Cir. 1984) 4, 5, 7

Railway Employees Department v. Hanson, 351 U.S. 225 (1956) 5

Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984) passim

Robinson v. New Jersey, 565 F. Supp. 942 (D.N.J. 1983) 2

School Committee v. Greenfield Education Association, 431 N.E.2d 180 (Mass. 1982) 4

STATUTES

California Govt. Code sec. 3515.7-3515.8 (West Supp. 1984) 3

New Jersey Stat. Ann. sec. 34:13A-5.5 (West Supp. 1984) 2, 3

SECONDARY AUTHORITIES

Clark, *Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 U. CINN. L. REV. 680 (1975) 9

Craver, *The Vitality of the American Labor Movement in the Twenty-first Century*, 1983 U. ILL. L. REV. 633 8

T. HAGGARD, COMPULSORY UNIONISM, THE NLRB, AND THE COURTS: A LEGAL ANALYSIS OF UNION SECURITY AGREEMENTS 264 (Labor Relations and Public Policy Series, Report No. 15, 1977) 6

Hewitt, *Unions, Civil Rights and the City Treasury: What Not to do When the Union Comes to Town,* 45 TEX. B.J. 863 (1982) 8

Leftwich, *Organizing in the Eighties: A Human Resources Perspective,* 32 LAB. L. J. 484 (1981) 8

Note, *Union Support by Nonunion Bargaining Unit Members in Minnesota Public Employment,* 10 WM. MITCHELL L. REV. 267 (1984) 9

Usery and Henne, *The American Labor Movement in the 1980s,* 7 EMPLOYEE REL. L. J. 251 (1981) 8

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STATE OF NEW JERSEY, ET AL.,
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Petitioners,

V.

GEORGE DEUKMEJIAN, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Legal Foundation of America moves for leave to file the attached amicus curiae brief and would respectfully show the Court as follows:

1. Identification of Amicus Curiae. The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. LFA is located on the campus of the South Texas College of Law in Houston and shares certain personnel and activities with the law school. Its goals, among others, include the preservation of the market system of resource allocation, the attainment of a better balance between the federal government and the States, and the furtherance of individual political and economic liberties. In pursuit of its purpose to enhance the function of the market system, LFA has frequently

appeared as amicus curiae in cases involving labor issues both in this Court and in lower courts. It has also appeared in cases involving the freedoms of speech and association. All litigation undertaken by LFA is approved by its Board of Trustees, which consists of attorneys, businesspeople and academics.

2. *Previous Appearance in this Court in a Related Case.* LFA appeared as amicus curiae last term in the case of *Ellis v. BRAC*, 104 S.Ct. 1883 (1984), which presented questions closely related to those in the case at bar.

3. *Desirability of an Amicus Curiae Brief.* The case is one of great public importance. The past involvement of this amicus curiae not only in *Ellis*, but in other speech and labor cases as well, makes it likely that amicus can assist the Court in developing the issues fully. Amicus here concentrates most heavily upon issues of public policy.

4. *Avoidance of Unnecessary Duplication.* Amicus curiae has carefully reviewed the Petition for Certiorari and Appendix in an effort to avoid unnecessary duplication. This brief adopts arguments from the Petition for Certiorari when appropriate and concentrates most heavily upon arguments not elsewhere raised.

5. *Reasons for Believing that Existing Briefs May Not Present All Issues.* Although the Petition for Certiorari is well drafted, the complexity of the issues makes it unlikely that any one party can develop them fully. There is need for other views to show the impact of the statutes at issue. For example, this brief discusses the impact of the statutes at issue upon democratic government, the reasons for preserving individual choice in the funding of political expression, the direct effect of the statutes upon the expression of union non-members who wish to dissent, and related questions. These issues are not otherwise presented as they are presented here.

6. *Requests for Consent of Parties.* This amicus curiae timely requested consent of all parties. The consent of Petitioners Robinson et al. and Champion et al. has been requested and received. The consent of many of Respondents has also

been requested and received. At least one opposing party, the Rutgers Chapter of the American Association of University Professors, has expressly refused to consent to the appearance of this amicus. Amicus curiae has accordingly filed this Motion pursuant to the Rules of this Court.

Respectfully submitted,

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NO. 84-920
NO. 84-1010

IN THE
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Respondents.

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING GRANT OF THE WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Amicus curiae adopts the statements made in paragraphs 1-3 of the Motion preceding this brief, as showing the interest of amicus curiae.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case made by Petitioners Robinson et al. and Champion et al., and would state only certain aspects of the case important to the arguments made here.

New Jersey, by statute, requires even non-members of public employee unions, who wish to dissent, to pay a fee to these unions.[1] The Statute does not limit the fee to collective bargaining expenditures. Instead, the statute authorizes unions to collect dues without a determination whether they include expenditures that cannot lawfully be coercively obtained from employees.[2] New Jersey has purported to avoid the first amendment violations produced by this coercion by allowing unions to use "demand and return" systems, by which they collect funds and then return them upon certain demands.[3] The resulting statutory system places onerous burdens[4] upon those who do not want to have their funds used improperly for political and ideological purposes, and it results in the obtaining of an "involuntary loan" from those individuals. Furthermore, since the unions report proper and improper expenditures only with "very simple and conclusory statements,"[5] and there is no standard for their accounting, unions are authorized to collect and use for improper purposes even funds of non-members who properly demand the return of their moneys. The district court found this system unconstitutional; the court of appeals disagreed.

The New Jersey statute further contains a specific provision to the effect that funds attributable to certain union lob-

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1 N.J. STAT. ANN. sec. 34:13A-5.5 (West Supp. 1984).

2 The New Jersey fee is set at the lesser of 85% of the regular membership dues or the amount of the regular membership dues less the cost of member only benefits. N.J. STAT. ANN. sec. 34:13A-5.5(b) (West Supp. 1984). Therefore, any time the combined total of member only benefits and political and ideological expenses exceeds 15% the fee paid will include amounts which cannot be collected.

3 N.J. STAT. ANN. sec. 34:13A-5.5(c) (West Supp. 1984).

4 Because the amounts involved are frequently not large in the individual instance, these burdens leave the individual with no economically feasible way to protect important first amendment rights.

5 Robinson v. New Jersey, 565 F. Supp. 942, 945 (D.N.J. 1983).

bying are not to be returned.[6] This statutory provision has the effect of forcing non-members to contribute support for political lobbying with which they vigorously disagree, taking place in the legislatures, administrative agencies, and other bodies that are supposed to represent them as citizens. Even though the lobbying may be on matters crucial to the general public, even though the non-members may disagree with the special interests represented by the lobbyists' positions, even though their own economic or other interests as citizens may be to the contrary, and even though the lobbying may involve efforts to influence the non-members' own elected representatives, the statute requires non-members to finance these lobbying activities. The court below held, again contrary to the district court, that such political support could be required from public employees,[6a] even though it could not be so required from employees in the private sector.

The California statute at issue, although different in some provisions, is similar in most important respects to the New Jersey statute, and the constitutional issues it presents are analogous.[6b] The district court denied a preliminary injunction against the enforcement of the statute, and the Court of Appeals affirmed.[6c] A detailed treatment of the California case is to be found in the Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS AND WITH THE DECISION OF A

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6 N.J. STAT. ANN. sec. 34:13A-5.5(c) (West Supp. 1984).

6a Robinson v. New Jersey, 741 F.2d 598, 609 (3d Cir. 1984).

6b Cal. Govt. Code sec. 3515.7-3515.8 (West Supp. 1984).

6c Champion v. California, 738 F.2d 1082, 1086 (9th Cir. 1984).

STATE COURT OF LAST RESORT, AS WELL AS WITH THE DECISIONS OF THIS COURT.

The United States Court of Appeals for the Seventh Circuit, in *Hudson v. Chicago Teacher's Union*, 743 F.2d 1187 (7th Cir. 1984), held unconstitutional a statutory rebate procedure similar to the one at issue here on the ground that it violated the freedom of speech and right to due process of non-members in allowing the union to collect and use their funds for unconstitutional purposes and to obtain an "involuntary loan." [7] The decision of the Seventh Circuit is in conflict with the decision in the cases at bar. In addition, the decisions at bar conflict with *School Committee v. Greenfield Education Association*, 431 N.E.2d 180 (Mass. 1982), in which the Supreme Judicial Court of Massachusetts construed the statute there at issue as not mandating resort to the statutory rebate procedure, making it clear that resort to such a procedure could not be required consistently with the Constitution.[7a]

The decision below further conflicts with the decision of this Court in *Ellis v. BRAC*, 104 S.Ct. 1883 (1984). While amicus recognizes that *Ellis* was decided as an interpretation of the Railway Labor Act rather than as a constitutional holding,[8]

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7 743 F.2d at 1196.

7a The Court stated that "[t]here is no constitutional or statutory justification . . . for requiring a dissenting employee to resort to the type of internal rebate procedure involved in this case," 431 N.E.2d at 188, and that the "teachers should not be required to suffer an interim constitutional deprivation . . ." 431 N.E.2d at 189.

8 Abood v. Detroit Board of Education, 431 U.S. 209 (1977) also involved constitutional violations. This Court, nonetheless applied precedents involving statutory violations stating that the "difference surely could not justify any lesser relief in this case." Id. at 240. The Third Circuit recognizes the applicability of Ellis by citing it as authority for their decision in this case.

Ellis holds that a rebate scheme "reduces but does not eliminate the . . . violation" that results from the coercive taking of funds for improper purposes.[9] This holding, which was the basis of the Seventh Circuit's decision in *Hudson v. Chicago Teacher's Union, supra*,[10] is in conflict with the holding in the cases at bar.

II. THE HOLDING THAT PUBLIC EMPLOYEES MAY BE REQUIRED FINANCIALLY TO SUPPORT POLITICAL LOBBYING TO "FOSTER" UNION "POLICY GOALS" PRESENTS SUBSTANTIAL QUESTIONS, WITH GREAT PRACTICAL CONSEQUENCES NATIONWIDE.

A. The holdings below conflict with the policy underlying this Court's previous decisions, which attempt to eliminate "free riders" while protecting employees from forced support of "political or ideological" speech.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court upheld the statutory authority of public employee unions to extract dues even from non-members to support collective bargaining. However, following *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956), the Court linked that extraction to the concern for "free riders" on the collective bargaining process[11] —that is, the concern that some employees might obtain the benefit of expenditures made in performance of the statutory duties of collective bargaining, contract administration, and grievance processing, while not contributing to those activities financially. *Ellis, supra*, reinforces the conclusion that this free rider concern is the "essen-

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9 104 S.Ct. at 1890.

10 743 F.2d at 1196.

11 431 U.S. at 221-224.

tial justification"[12] for the governmental coercion of financial support from non-members who would prefer to dissent. For that reason, the decisions do not go beyond permitting coerced support for functions that are an "integral part of" collective bargaining.[12a] The decisions further hold that such coerced support cannot lawfully be used for "political or ideological" purposes.[13]

The free rider concern is entirely inapplicable in the present context. The public employee not only has an interest as an employee, but he "also occupies the role of a compulsory taxpayer, who must finance the union's demands, while the private employee occupies no analogous position *vis-a-vis* his employer's financing."[14] The economic interest of the employee may well be adverse to the position upon which he is obtaining a putative "free ride." Furthermore, regardless of the "benefit" to the employee, if the authorized union activity goes beyond that necessary to perform the duties of an exclusive bargaining representative, the state has no justification for coercing support of the union position. The cases have clearly disallowed the collection of funds for "political or ideological" purposes, and lobbying "to foster policy goals" is such a purpose.[15]

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12 104 S.Ct. at 1892.

12a See Abood, 431 U.S. at 236; Cf. Ellis, 104 S.Ct. at 1892-94.

13 See Ellis, supra, 104 S.Ct. at 1892; Abood, supra, 431 U.S. at 234.

14 T. HAGGARD, COMPULSORY UNIONISM, THE NLRB, AND THE COURTS: A LEGAL ANALYSIS OF UNION SECURITY AGREEMENTS 264 (Labor Relations and Public Policy Series, Report No. 15, 1977).

15 Such lobbying is comparable to union organizing and political contributions to pro-labor candidates, which this Court notes "is a far cry from the free-rider problem with which Congress was concerned." Ellis, supra, 104 S.Ct. at 1895.

B. Despite the national importance of the issue, this Court has not yet drawn a clear line between permissible and impermissible exactions from public employees.

Notwithstanding the clear implication of the "free rider" principle and the prohibition upon coerced support of "political and ideological" causes, however, the Court has not yet drawn a clear line between permissible and impermissible coercion of support of public sector unions.[16] Numerous cases of the same nature as the present case have been and will be the result. The cases vary dramatically in the degree to which they allow coercion of support for acknowledged political lobbying.

The Ninth Circuit's decision in *Champion v. California* states that public employee unions must be given "broad authority to protect their members' interests before the legislature."[17] This "broad authority" will, as a practical matter, enable those in power in unions within the Ninth Circuit to coerce support of virtually any position through political lobbying. The Third Circuit's decision in *Robinson v. New Jersey* gives such authority so long as it is exercised to "foster policy goals" of the union that can somehow be arguably related to the collective process. The holdings of the Third and Ninth Circuits are quite different from this Court's previous requirement that coerced fees may only be collected for actions that are integrally a part of collective bargaining and cannot be used for political or ideological purposes.[17a] The decision of the Seventh Circuit in *Hudson, supra,* reversed because the statute failed to provide a procedure that would ensure that nonmember fees were not used, even temporarily, for political and ideological activities, or for any activity not an integral part of collective bargaining. The same

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16 431 U.S. at 236, cited in Robinson, 741 F.2d at 607.

17 738 F.2d at 1086.

17a See Abood, supra, 431 U.S. at 236; cf. Ellis, supra, 104 S.Ct. at 1892-94.

question must of necessity arise in every circuit and every state in which agency shops are used in public employment.

The enormous growth of public employee unions within recent years [18] reinforces the importance of the question. In the private sector, unions are affected by economic circumstances (including competition), and coerced subsidies for political lobbying are denied them. The explosive growth of unions in the public sector, while employee choice in the private sector has resulted in a decline, [19] may be a consequence of the amenability of the employment system to organized political influence in an environment lacking the economic limits imposed by competition. Thus the political activities of public employee unions should be, if anything, of greater concern than those of private sector unions. The lower court's allowance of political coercion of public employees in a manner that would be denied private sector unions is anomalous and particularly calls for this Court's review.

C. These cases have serious implications for the democratic process, for the rights of citizens to a republican form of government, and for the freedom of speech.

The result of forced financial support of union lobbying will be a distortion of the democratic process. No other group has the authority to draw upon government coercion to support its political agenda. One commentator puts the matter as follows:

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18 See Craver, The Vitality of the American Labor Movement in the Twenty-first Century, 1983 U. ILL. L. REV. 633, 659; Hewitt, Unions, Civil Rights and the City Treasury: What Not to do When the Union Comes to Town, 45 TEX. B.J. 863, 863 (1982); Usery and Henne, The American Labor Movement in the 1980s, 7 EMPLOYEE REL. L. J. 251, 252 (1981).

19 Craver, supra, note 18 at 634; Leftwich, Organizing in the Eighties: A Human Resources Perspective, 32 LAB. L. J. 484 (1981); Usery and Henne, supra, note 18 at 252.

> The political aspects of public sector collective bargaining . . . jeopardize the very premise upon which collective bargaining exists, *i.e.*, that each party will vigorously represent its own interests and that neither party has the right to dictate who the other party's representatives are.
>
> The political aspects of public sector collective bargaining enable public sector unions to, in effect, sit on both sides of the bargaining table. [20]

This arrangement denies the first amendment interests not only of non-member public employees who wish to dissent, but of the general citizenry as well. It is a distortion of the marketplace of ideas. Nor is the distortion an insignificant one; a recent law review commentary points out that lobbying fees extracted from all public employees in the United States of only $5.00 per month would result in a total lobbying fund of $700 million per year, [21] an amount disproportionate to the lobbying strength of any other interest group likely to be in opposition.

The issues upon which a union would lobby the legislature with such funds are not mere "workplace issues" such as the questions of seniority, wages, or hours that would arise in a private-sector firm. Instead, lobbying forced to be paid for by dissenters under the opinions below will include such issues as whether there will be merit pay for teachers, whether there will be affirmative action in police departments, and whether scarce resources will be allocated to mass transit or to highways. As the

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20 Clark, Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem, 44 U. CINN. L. REV. 680, 684 (1975).

21 NOTE, Union Support by Nonunion Bargaining Unit Members in Minnesota Public Employment, 10 WM. MITCHELL L. REV. 267, 280 (1984).

Petition for Certiorari in *Champion* points out, [21a] a single union in California opposed or introduced 49 different pieces of legislation in 1982, on such subjects as civil service reform, taxation on health care service plans, managerial benefits, housing mortgages, prisoners' work, realty investment, changes to the bargaining process, bank and corporate tax, and personal service contracting. By definition, issues upon which one might lobby the legislature are issues of general public concern. This is a case with substantial impact upon the most fundamental processes set up by the Constitution.

In addition to the general public, the non-member employee who wishes to dissent has important interests that the courts below failed to recognize. While acknowledging the right not to speak, for example, the Third Circuit erroneously made the right depend upon whether the individual's own economic interests would be harmed by the forced support of speech. Historically, however, men have supported the rights of women, whites have fought for the interests of blacks, and wealthy persons have championed the interests of the poor. Conversely, no State could lawfully pass a statute requiring women financially to support advocacy for the Equal Rights Amendment, blacks to support affirmative action, or the poor to support Aid to Families with Dependent Children. The present situation is analogous. Thus the court below ignored the possibility that an individual employee might disagree with objectives that a union considers in his interest, because he deems them unfair, or against public policy, or unprofessional. For example, he may desire affirmative action when his union bitterly opposes it. The lower court's reasoning, linking the right not to speak with the speaker's economic interests as perceived by the union, is inconsistent with the right-not-to-speak decisions of this Court.

21a Petition for Certiorari at n. 3, citing Appellant's excerpts from Record at 315-71.

One undesirable result of this arrangement is that employees who have strong feelings against financial support of the political agenda identified by a union will begin to avoid public service. The decision below inevitably must mean that public employment will be limited to persons who either agree with prevailing union views on political questions or who lack strong political convictions. Such a result would be ironic in view of this Court's decisions against political tests for non-policymaking public employees.[22] The contradiction would be particularly poignant in the case of college professors or teachers, such as some of the petitioners in this case, who may be especially uncomfortable expressing one view in the classroom while supporting the opposite view financially. Furthermore, teachers may find themselves professionally disadvantaged if their effort is to remain politically neutral in the classroom. If these public servants deal with the dilemma by limiting their speech in classes on political science, constitutional law, history or ethics—or if they leave public sector employment because of the inconsistency of their professional standards with support of the union's political lobbying—the loss is in the quality of public service, and in the protection of the marketplace of ideas.

Finally, the court below ignored reality when it equated the economic interests of individual workers with the positions of unions. A public employee may be minimally assisted by an expensive public program but may be adversely affected to a greater degree as a homeowner who pays taxes. Or an individual employee may oppose the seniority program vigorously lobbied for by the union, because he thinks it interferes with affirmative action and because he is black. An employee who is adversely affected by such a union position cannot be forced to support political lobbying of his own elected representatives against his interest, without the raising of substantial questions regarding the freedom of speech and the right of petition. Those issues have not been, but should be, resolved by this Court.

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22 See, e.g., Elrod v. Burns, 427 U.S. 347 (1976).

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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October Term, 1984

LYDIA B. CHAMPION, et al.,
Petitioners,

v.

GEORGE DEUKMEJIAN, et al.,
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF H. PAUL LILLEBO IN SUPPORT OF PETITIONERS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF H. PAUL LILLEBO IN SUPPORT OF PETITIONERS AND BRIEF AMICUS CURIAE OF H. PAUL LILLEBO IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF H. PAUL LILLEBO IN SUPPORT OF PETITIONERS 1

BRIEF AMICUS CURIAE OF H. PAUL LILLEBO IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 5

INTEREST OF AMICUS 5

OPINION BELOW 5

SUMMARY OF ARGUMENT 6

ARGUMENT

I. PRELIMINARY INJUNCTIVE RELIEF IS APPROPRIATE WHEN A FACIAL ATTACK IS MADE ON AN AGENCY SHOP STATUTE 6

II. THE CALIFORNIA COLLECTIVE BARGAINING STATUTE IS UNCONSTITUTIONAL ON ITS FACE 9

A. The California Statute Authorizes Collection and Expenditure of Agency Shop Fees for Political Activities 10

B. The California Statute Authorizes Collection and Expenditure of Agency Shop Fees for Political Lobbying Purposes 11

CONCLUSION 15

TABLE OF AUTHORITITES CITED

Pages

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 10, 11, 12, 13, 14

American Federation of State, County, and Municipal Employees v. State of Washington, 578 F. Supp. 846 (W.D. Wash. 1983) 14

Brotherhood of Railway and Steamship Clerks v. Allen, 373 U.S. 113 (1963) 6, 7, 10

Champion v. State of California, 738 F.2d 1082 (9th Cir. 1984) 2, 5, 6

County of Washington v. Gunther, 452 U.S. 161 (1981) 14

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 8

Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, — U.S. —, 104 S. Ct. 1883 (1984) 9, 10, 11

Elrod v. Burns, 427 U.S. 347 (1976) 8

International Association of Machinists v. Street, 367 U.S. 740 (1961) 6, 7, 8, 9, 10, 15

Little Rock and Fort Smith Railway v. Worthen, 120 U.S. 97 (1887) 8

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 10, 11

Woodruff v. Parham, 75 U.S. 123 (1869) 8

TABLE OF AUTHORITIES CITED—Continued

Pages

STATUTES

California Government Code § 3515 2
§ 3515.8 ..... 1, 3, 7, 8, 9, 10, 11, 13, 14
§ 3517 ..... 12, 13
§ 3517.5 12
§ 3517.6 ..... 2, 12, 13
§ 19815.4(g) 12, 13
§ 19844 12
§ 19851 12
§ 19856 12
§ 19859 12

CALIFORNIA CONSTITUTION

California Constitution, Art. IV, § 12 12

UNITED STATES CONSTITUTION

First Amendment 10, 11, 12, 13, 14, 15
Fourteenth Amendment 12, 13

No. 84-1010

In The
Supreme Court of the United States
October Term, 1984

LYDIA B. CHAMPION, et al.,

Petitioners,

v.

GEORGE DEUKMEJIAN, et al.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF H. PAUL LILLEBO IN SUPPORT OF PETITIONERS

This motion of H. Paul Lillebo for leave to file the annexed brief amicus curiae in support of the petition for writ of certiorari is respectfully made pursuant to Rule 36 of the Supreme Court. Consent to the filing of this brief has been obtained from counsel for petitioners and has been lodged with the clerk of this Court. Counsel for respondents has refused consent.

H. Paul Lillebo is one of 210 named plaintiffs challenging the constitutionality of California Government Code § 3515.8 in the California courts. *Lillebo v. Cory,* No. 311329 (Sacramento County Superior Court, filed May 2, 1983). Every plaintiff in that action is a California state

employee and is compelled to pay agency shop fees pursuant to California Government Code § 3515, as are the petitioners in the present case. Neither petitioners nor the plaintiffs in *Lillebo v. Cory* are members of their recognized collective bargaining representative, California State Employees Association, a respondent in this case. Both petitioners in this case and the plaintiffs in *Lillebo v. Cory* have objected to the expenditure of fair share fees for political causes. The California law in question, however, specifically authorizes such use of dissenting nonmembers' fees. Due to the identity between the present case and *Lillebo v. Cory,* amicus curiae, H. Paul Lillebo, asserts a vested interest in the outcome of this petition.

The decision of the Ninth Circuit Court of Appeals below is extremely prejudicial to the case of amicus pending in state court. After discussing the impropriety of a preliminary injunction, the court then stated that public employee representatives should be given broad authority to lobby the state Legislature due to the fact that many negotiation matters are covered by statute. *Champion v. State of California,* 738 F.2d 1082, 1086 (9th Cir. 1984). This statement ignores Government Code § 3517.6, which states that a memorandum of understanding supersedes the statutes mentioned in the lower court's opinion. Nevertheless, this erroneous phrase surely will be cited against H. Paul Lillebo and the 209 other plaintiffs in *Lillebo v. Cory.*

Amicus contends that there is a need for additional argument in light of the erroneous holding of the Court of Appeals cited above. Due to his experience with the California collective bargaining system, amicus is uniquely qualified to point out particular aspects of this system which demonstrate that lobbying in California is not an

activity germane to the duties of the collective bargaining representative. Since this discussion indicates that Government Code § 3515.8 is unconstitutional on its face, amicus is prepared to distinguish on this basis previous decisions of this Court which do not permit preliminary injunctive relief.

For these reasons, H. Paul Lillebo requests that this motion to file the annexed brief amicus curiae be granted.

DATED: January 15, 1985.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF H. PAUL LILLEBO IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF AMICUS

The interest of amicus is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported officially at 738 F.2d 1082 (1984).

SUMMARY OF ARGUMENT

The court below misapplied precedent in denying petitioners preliminary injunctive relief. This case does not challenge the application of agency shop fees to a particular individual; rather, this case facially challenges the substantive merits of the statute authorizing the collection of said fees. The statute is invalid on its face because it specifically authorizes collection of these compelled fees for expenditure in support of political and ideological activities. Considerations for denying preliminary injunctive relief therefore disappear.

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ARGUMENT

I

PRELIMINARY INJUNCTIVE RELIEF IS APPROPRIATE WHEN A FACIAL ATTACK IS MADE ON AN AGENCY SHOP STATUTE

In denying petitioners preliminary injunctive relief, the court below relied on the holdings of this Court in *International Association of Machinists v. Street*, 367 U.S. 740, 771 (1961), and *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 120 (1963). *Champion v. State of California*, 738 F.2d at 1084-85. The lower court interpreted these cases as holding that a temporary injunction is never appropriate when challenging the constitutionality of an agency shop fee statute. Amicus asserts that the lower court erred in applying this rule to all such cases. The lower court should have distinguished between cases alleging facial unconstitutionality of the

statute and cases alleging unconstitutionality of the statute as applied.

It is significant to note that *Street* and *Allen* involved an "as applied" challenge to agency shop fees. In both cases, plaintiffs discovered that these fees were being spent for political causes and brought suit to enjoin all collection of agency shop fees. *Street*, 367 U.S. at 744-45; *Allen*, 373 U.S. at 117. This Court noted in *Street* that the plaintiffs' cause of action "stems not from constitutional limitations on Congress' power to authorize the union shop, but from [the statute] itself." *Street*, 367 U.S. at 771. Similarly, the *Allen* majority distinguished between the spending of money under the statute and the validity of the statute. *Allen*, 373 U.S. at 120. Since plaintiffs' claims in *Street* and *Allen* involved the improper implementation of the statutes in question, the granting of a preliminary injunction was held to be an inappropriate remedy. *Id.; Street*, 367 U.S. at 771.

Petitioners' claim is not based upon the mere improper expenditure of agency shop fees. Instead, petitioners allege that the statute authorizing the collection of agency shop fees for lobbying purposes (Gov't Code § 3515.8)[1] is unconstitutional on its face. Petitioners' action thus stems from the constitutional limits on the Legislature's power to authorize the agency shop, not from the illegal implementation of the statute. *Cf. Street*, 367 U.S. at 771. Due to this distinction, amicus asserts that granting a preliminary injunction in this case will not contradict prior holdings of this Court.

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[1] All statutory references are to the California Government Code unless otherwise noted.

Moreover, amicus argues that the reasons for denying temporary injunctive relief when the application of a statute may be illegal become irrelevant when the substantive validity of the statute is raised. In *Street,* this Court realized that restraining the collection of all shop fees could interfere with the proper purposes of the statute in question. *Id.* This logic presupposed a finding that the purposes of the statute are indeed proper, as this Court found in *Street. Id.* at 763-64. The present case involves claims that the purposes of Government Code § 3515.8 are improper and unconstitutional. It is well settled that an unconstitutional law is void *(Woodruff v. Parham,* 75 U.S. 123, 140 (1869)), and is considered to be not a law at all, binding no one *(Little Rock and Fort Smith Railway v. Worthen,* 120 U.S. 97, 102 (1887)). Therefore, an injunction against an unconstitutional statute does not interfere with proper purposes; rather, an injunction prevents further infringement of constitutional rights.

In light of the fact that a facial constitutional challenge has been made, equitable principles dictate that preliminary injunctive relief be granted in this case. Cases through the years have held that preliminary injunctive relief is available upon the satisfaction of four criteria: (1) the probability of success on the merits; (2) the possibility of irreparable harm to the plaintiff; and (3) the balance of hardship favoring the plaintiff. *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931 (1975). The infringement of constitutional rights works an irreparable harm *(Elrod v. Burns,* 427 U.S. 347, 373-74 (1976)), and the probability of success will be demonstrated in Part II of this argument, *infra.* The most important threshold to clear, then, is a showing that the balance of hardships favors the plaintiff.

In *Street*, this Court held that this balance favored the defendant, as an injunction would interfere with legitimate functions of the union. 367 U.S. at 119-20. In the present case, petitioners claim that the agency shop fee statute is void and without effect. The defendant therefore can assert no valid interest to counter the constitutional interests of the petitioners. Since the balance of hardship must favor the petitioner, a preliminary injunction should issue.

Equitable relief is the only adequate remedy of the petitioners in this case. The statute at issue in this case specifically authorizes the employee association to use a dissenting nonmember employee's compelled fee to finance the cost of legislative lobbying, even though the employee may object to the particular cause endorsed. Gov't Code § 3515.8. The only way for petitioners to gain relief is to declare the statute unconstitutional. Denying the petitioners preliminary injunctive relief only postpones the inevitable and perpetuates the violation of the constitutional rights of petitioners. This Court recently held that even a temporary violation of the rights of dissenting employees is intolerable. *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, — U.S. —, 104 S. Ct. 1883, 1890 (1984). The case for preliminary injunctive relief becomes all the more compelling upon realization of the grievous constitutional flaws in the California statutory scheme.

II

THE CALIFORNIA COLLECTIVE BARGAINING STATUTE IS UNCONSTITUTIONAL ON ITS FACE

This Court has held on numerous occasions that expenditures of union shop fees for political causes violate the rights of those employees who do not agree with the

cause. *See, e.g., Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 104 S.Ct. at 1896; *Abood v. Detroit Board of Education,* 431 U.S. 209, 233-37 (1977); *Allen,* 373 U.S. at 118; *Street,* 367 U.S. at 768-70. The test for determining the permissibility of an expenditure is "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ellis,* 104 S.Ct. at 1892. The California statute specifically authorizes the collection and expenditure of agency shop fees from dissenting nonmembers for political purposes unrelated to the respondents' collective bargaining function. For this reason, Government Code § 3515.8 is unconstitutional on its face.

A. The California Statute Authorizes Collection and Expenditure of Agency Shop Fees for Political Activities

On its face, the California statute requires refunds of expenditures only for *partisan* political or ideological causes. Gov't Code § 3515.8. Significantly, only partisan political expenditures are included, and nonpartisan political expenditures are implicitly nonrefundable. Nonpartisan political expenditures of a dissenting nonmember employee's compelled fees are, therefore, specifically authorized by the statute.

This Court has never distinguished between partisan and nonpartisan political views. First Amendment freedoms have always been framed in terms of freedom of conscience, whether or not partisan politics are involved. *See West Virginia State Board of Education v. Barnette,*

319 U.S. 624, 642 (1943). The agency shop fee cases are no exception, as this Court recently repeated the rule that dissenting employees "could not be burdened with any part of the union's expenditures in support of *political or ideological* causes." *Ellis,* 104 S. Ct. at 1891 (emphasis added).

The California statute is underinclusive, as this law prohibits use of a dissenting nonmember's compelled fees for partisan political expenditures but specifically authorizes and encourages the use of such fees for nonpartisan political activities. The utilization of agency shop fees for political causes, partisan or nonpartisan, violates the First Amendment rights of employees who do not agree with the particular cause. *Abood,* 431 U.S. at 237. As a matter of law, Government Code § 3515.8 violates the First Amendment.

B. The California Statute Authorizes Collection and Expenditure of Agency Shop Fees for Political Lobbying Purposes

This Court held in *Abood* that compelling employees to support financially a collective bargaining representative impacts on the associational rights of the employees guaranteed by the First Amendment. *Abood,* 431 U.S. at 222-23. Yet, this interference is justified by the governmental interest in stable labor relations provided by the agency shop. *Id.* at 222-23. This interest may be advanced by expenditures of agency shop fees for activities that are "an integral part of the bargaining process." *Id.* at 236. Lobbying a legislative body to secure the approval of a collective bargaining agreement may be "germane to [a representative's] duties as a collective-bargaining representative." *Id.* at 235. The expenditure of agency shop

fees for lobbying for the expression of political views or for the advancement of ideological causes, on the other hand, is not related to the collective bargaining function and violates the First and Fourteenth Amendment rights of nonmembers. *Id.* at 235-37.

Under the California collective bargaining system, the California Department of Personnel Management is charged to serve as the representative of the Governor in negotiations with collective bargaining representatives. Gov't Code §§ 3517, 19815.4(g). When agreement is reached between the parties, the terms of the agreement are finalized in a memorandum of understanding. Gov't Code § 3517.5. While the California Legislature has provided for some terms of employment such as hours, overtime compensation, sick leave, and vacation by statute (*see* Gov't Code §§ 19844, 19851, 19856, and 19859) this same Legislature also provided that the terms of a memorandum of understanding supersede statutory provisions in the event of a conflict. Gov't Code § 3517.6. In California, then, the primary focus in the collective bargaining process is on the negotiation process between the executive branch and the employee representative.

The state Legislature plays a small role in the California system. Pursuant to the fiscal powers granted to this body by Article IV, Section 12 of the California Constitution, the approval of the state Legislature must be obtained for a memorandum of understanding if the expenditure of funds is involved. *Id.* The overriding effect of the memorandum of understanding precludes the Legislature from becoming involved in collective bargaining matters in real terms, as any statute affecting conditions

of employment will be rendered impotent by this memorandum.

From the above discussion, it is clear that lobbying the Legislature does not further the governmental interests justifying the agency shop. As this Court noted in *Abood,* the interest in stable labor relations would be advanced by expenditures of shop fees for activities that function as an integral part of the bargaining process. *Abood,* 431 U.S. at 222-23, 236. In California, the bargaining process centers on the Director of the Department of Personnel Administration and the employee representative. Gov't Code §§ 3517, 19815.4(g). The agreement reached between the parties supersedes most statutory provisions pertaining to public employment. Gov't Code § 3517.6. Due to this fact, there is no need to lobby the Legislature to pass legislation regarding employment terms, as a subsequent memorandum of understanding may render this legislation ineffectual. Consequently, any lobbying effort which is not related to securing the approval of a bargaining agreement by the Legislature is not an integral part of the bargaining process and does not advance the governmental interest justifying the agency shop. Yet, the California statute forces employees to contribute towards lobbying efforts purporting to secure benefits "in addition to those secured through meeting and conferring with the state employer." Gov't Code § 3515.8. Therefore, compelling an employee to support such lobbying violates the First Amendment rights of association of the employee. Amicus thus argues that Government Code § 3515.8 violates the First and Fourteenth Amendments to the United States Constitution on its face.

This Court stated in *Abood* that the expenditure of agency shop fees for the expression of political or ideological goals violates the First Amendment. *Abood,* 431 U.S. at 235-37. Under the statute at issue, petitioners are compelled to support financially lobbying efforts aimed at achieving the policy goals of the collective bargaining representative. A collective bargaining representative may have many policy goals which are political or ideological in nature. *Abood,* 431 U.S. at 222. A recent example would be in the pay equity area, where collective bargaining representatives have sued governmental entities over the implementation of comparable worth. *See, e.g., American Federation of State, County, and Municipal Employees v. State of Washington,* 578 F. Supp. 846 (W.D. Wash. 1983). As this Court has noted, comparable worth is a controversial topic. *County of Washington v. Gunther,* 452 U.S. 161, 166 n.6 (1981). Under California law, employees opposing comparable worth could be forced to support financially lobbying designed to effectuate a policy in favor of this concept.

There are other controversial political or ideological issues which a collective bargaining representative could lobby for as a policy goal: affirmative action, medical coverage for abortion, and preferential seniority systems. As this Court stated in *Abood,* the mere expression of political views by an exclusive representative does not infringe on constitutional rights. *Abood,* 431 U.S. at 235. However, financing any such expression with moneys paid by objecting employees as a condition of employment does violate the First Amendment. *Id.* at 235-36. Since the California statute authorizes fair share fees to be spent to lobby for political or ideological policies, Government Code § 3515.8 violates the First Amendment on its face.

CONCLUSION

Denying preliminary injunctive relief to the petitioners serves no valid interests. Blind application of the rule expressed in *Street* deprives petitioners of their constitutional rights by permitting the collective bargaining representative to lobby for any desired policy goal until a final judgment is rendered. If lengthy appeals are involved, the employee's rights could be infringed for a number of years. The concerns of this Court in *Street* regarding the continued functioning of the collective bargaining system are not involved in the present controversy. The only interest served by denial of a preliminary injunction is the interest of the collective bargaining representative which is allowed to use compelled fees to lobby for political and ideological policy goals a result which is *a fortiori* violative of the petitioners' First Amendment rights. For these reasons, amicus H. Paul Lillebo urges this Court to grant a writ of certiorari to the Court of Appeals for the Ninth Circuit and decide this case in favor of petitioners.

DATED: January, 1985.

Respectfully submitted,

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No. 84-1010

IN THE

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OCTOBER TERM, 1984

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On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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MOTION OF PUBLIC SERVICE RESEARCH COUNCIL FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

and

BRIEF *AMICUS CURIAE*

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IN THE

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OCTOBER TERM, 1984

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MOTION OF PUBLIC SERVICE RESEARCH COUNCIL FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

INTRODUCTION

Pursuant to Rule 36.1 of the Rules of this Court, Public Service Research Council hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari. Respondent California State Employees Association has refused to consent to such filing.

INTEREST OF THE *AMICUS CURIAE*

Public Service Research Council is an independent national association of some 900,000 scholars, com-

mentators, legislators, and private citizens from all walks of life united by a common concern for the maintenance of effective constitutional government. The Council engages in non-partisan research and education regarding, among other things, the character and operation of collective bargaining in public employment, and its effects on governmental institutions and the provision of public services at the local, state, and national levels.

The Council has developed considerable expertise concerning the philosophical, political, social, legal, economic, and practical aspects of public-sector unionism and collective bargaining.[1] On numerous occasions, it has provided this and other Courts with its views in briefs *amicus curiae*.[2]

In the instant case, the Council believes that the parties may not fully present to the Court what the

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[1] For example, the Council's sister-organization, the Public Service Research Foundation, regularly publishes scholarly articles on these subjects in the *Government Union Review: A Quarterly Journal on Public Sector Labor Relations*.

[2] *E.g.*, Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Rel'ns Authority, No. 82-799 (U.S. Sup. Ct.); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, No. 81-896 (U.S. Sup. Ct.); PATCO v. United States, No. 81-542 (U.S. Sup. Ct.); Jackson Transit Authority v. Local Division 1285, Transit Union, No. 81-411 (U.S. Sup. Ct.); City of Madison, Joint School Dist. No. 8 v. WERC, No. 75-946 (U.S. Sup. Ct.); National League of Cities v. Usery, No. 74-878 (U.S. Sup. Ct.); Virginia v. Arlington County Bd. of Supervisors, No. 18747 (Va. Ct. App.); Pacific Legal Foundation v. Brown, 3 Civil No. 18364 (Cal. Ct. App.); United States v. PATCO, Civil Action No. 81-1805 (D.D.C.); United States v. PATCO, Civil Action No. 81-0763A (E.D. Va.); Air Transport Ass'n of America v. PATCO, No. 70-C-400 (E.D.N.Y.).

Council sees as the central issue informing the decision to issue a writ of certiorari at this stage of the litigation: namely, that denial of the petition will indicate to the country as a whole, and especially to self-interested public-sector unions and their politically motivated allies in state and local governments,

(i) that this Court's pronouncements in *Abood* v. *Detroit Board of Education*[3] and *Ellis* v. *BRAC*[4] on behalf of the constitutional rights of non-union employees are lofty, but ultimately empty platitudes;

(ii) that this Court's manifest disinterest in effectively enforcing *Abood* and *Ellis* licenses the unions and their partisans in official positions to ride roughshod over employees' fundamental liberties, immune in practice from judicial scrutiny and reproof; and

(iii) that therefore this Court lacks credibility as the guardian of constitutional rights, not only where public-sector unions are involved, but also where any private special-interest group is politically powerful enough to overawe legislators into enacting its illegitimate goals into law, and to connive with inferior courts to misinterpret and misapply this Court's decisions so as to whitewash what is really going on.

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[3] 431 U.S. 209 (1977).

[4] —— U.S. ——, 104 S. Ct. 1883 (1984).

CONCLUSION

Wherefore, the Council prays that this Court grant its motion for leave to file the attached brief *amicus curiae.*

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

INTEREST OF THE *Amicus Curiae* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

I. Because of the unprecedented but undeniable substantive and procedural invalidity of California's fair-share-fee scheme, *Abood* and *Ellis* compel entry of preliminary injunctive relief 2

II. Not to enforce *Abood* and *Ellis* in this case will draw into question both this Court's willingness to police revisionism by the inferior federal courts, and its own commitment to the constitutional principles those decisions enunciated 8

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

Cases

Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) ..... *passim*

BRAC v. Allen, 373 U.S. 113 (1963) 4

Champion v. California, 738 F.2d 1082 (9th Cir. 1984) .4, 6, 8

Ellis v. BRAC, — U.S. —, 104 S. Ct. 1883 (1984) *passim*

Hudson v. Local No. 1, Chicago Teachers Union, 743 F.2d 1187 (7th Cir. 1984) 7

IAM v. Street, 367 U.S. 740 (1961) 4

Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984) .. 7

Statute and Rule

California Government Code § 3515.8 ..... 3, 5

Rule 36.1 of the Rules of the Supreme Court of the United States 1

Miscellaneous

J. Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government,* (P. Laslett ed. 1960) 11

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BRIEF *AMICUS CURIAE* OF PUBLIC SERVICE RESEARCH COUNCIL IN SUPPORT OF THE PETITION FOR CERTIORARI

INTRODUCTION

Pursuant to Rule 36.1 of the Rules of this Court, Public Service Research Council submits this brief *amicus curiae* in support of the petition for certiorari.

INTEREST OF THE *AMICUS CURIAE*

The Council has set forth its interest in this case in its motion attached hereto, under the heading "INTEREST OF THE *Amicus Curiae*", and respectfully refers the Court thereto.

SUMMARY OF THE ARGUMENT

A writ of certiorari is warranted here because the decision of the Court of Appeals for the Ninth Circuit flies in the face of this Court's decisions in *Abood* v. *Detroit Board of Education*[1] and *Ellis* v. *BRAC*.[2] Moreover, the disparity between the Court of Appeals' opinion and this Court's contrary opinions in *Abood* and *Ellis* is so obvious, great, unjustifiable, and pregnant with serious consequences for the administration of the federal judicial system, as well as for the constitutional liberties of non-union public employees, that for this Court to deny a writ would be to call into question either its own willingness to police the inferior federal courts, or its own continuing commitment to the fundamental principles of *Abood* and *Ellis*.

ARGUMENT

I. Because of the unprecedented but undeniable substantive and procedural invalidity of California's fair-share-fee scheme, *Abood* and *Ellis* compel entry of preliminary injunctive relief.

On its face, California's fair-share-fee scheme is an unprecedented, but undeniable affront to the principles this Court enunciated in *Abood* and *Ellis* concerning the substantive and procedural limitations that the Constitution imposes on such arrangements in both public and private employment.

A. Substantively, the statute licenses a public-employee union to collect, retain, and spend dissenting employees' fair-share fees "in aid of activities or

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[1] 431 U.S. 209 (1977).

[2] —— U.S ——, 104 S. Ct. 1883 (1984).

causes of a partisan political or ideological nature" that are more than "only incidentally related to the terms and conditions of employment", and for the "support of lobbying activities designed * * * to secure for the employees represented [by the union] advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer".[3] Thus, the statute explicitly allows forced subsidization of "lobbying activities" that are directed to matters *outside of* ("in addition to") collective bargaining, and of "activities or causes of a partisan political or ideological nature" that have *no connexion at all* to such bargaining, other than a gossamer-thin more-than-"incidental" relation to its subject matter.

Abood, however, squarely held that a public-employee union may compel dissenters to subsidize its "lobbying activities" only to the extent that those activities constitute an integral and necessary part of the collective-bargaining process itself.[4] And *Abood* squarely held that *no* union expenditures for "political or ideological"—let alone "*partisan* political or ideological"—activities or causes are chargeable to dissenters at all.[5] Under *Abood,* therefore, California's fair-share-fee scheme is unconstitutional on its face, at least to the extent that it licenses (as it does) public-employee unions even to collect—let alone to spend—compulsory payments for non-collective-bargaining "lobbying activities" and for any "activities

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[3] Cal. Gov't Code § 3515.8.

[4] 431 U.S. at 236.

[5] *Id.* at 235-36.

or causes of a partisan political or ideological nature". And, for that reason, simply perforce of *Abood* petitioners are immediately entitled both to a permanent and *a fortiori* to a preliminary injunction against enforcement of the statute to the extent of its obvious unconstitutionality.

The Court of Appeals' attempt to avoid this result on the supposed authority of *IAM* v. *Street*[6] and *BRAC* v. *Allen*[7] is feckless.[8] For *Street* and *Allen* denied injunctive relief in the context of an "union-security" scheme that this Court not only held constitutional on its face but also construed to prohibit the very types of union political and lobbying expenditures of dissenters' monies that California's statute explicitly allows here.[9] Yet, under the Court of Appeals' aberrant view of those decisions, the substantive protection *Abood* provides for dissenting public employees evaporates. For, even if California had baldly stated that, subject to a later (invalid) "rebate",[10] public-employee unions could collect and spend fair-share fees "for purposes unconstitutional under *Abood*", according to the Court of Appeals no preliminary injunctive relief would be appropriate—notwithstanding that, without such relief, these concededly unconstitutional collections and expenditures

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[6] 367 U.S. 740 (1961).

[7] 373 U.S. 113 (1963).

[8] *See* Champion v. California, 738 F.2d 1082, 1084-85 (9th Cir. 1984).

[9] *See* Street, 367 U.S. at 768-69 (political causes and activities), 769 n.17 (lobbying).

[10] *See post*, Part I.B.

would *irreparably* injure dissenters' interests in freedom of speech, association, and belief. Here, of course, California has not admitted in so many words that its fair-share-fee scheme offends *Abood*. But no one who reads *Abood* intelligently can conclude other than that it does. So, if the Court of Appeals' decision is allowed to stand, this Court's inaction will effectively hallow the grotesquely *anti*-constitutional premiss of that decision: to wit, that state legislatures may enact, and the inferior federal courts may at least temporarily enforce, substantively unconstitutional statutes for the special benefit of public-employee unions.

B. Procedurally, California's fair-share-fee statute licenses a public-employee union to collect and spend unconstitutional fees subject to dissenting employees' "right to demand and receive from [the union], under procedures established by the [union], a return of" the invalid "part" of those fees.[11] The State's only involvement in the entire procedure (other than as a compliant bag-man for the initial extraction of the fees) is to empower its Public Employment Relations Board to "compel [a union] to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section" [12]—that is, to authorize the Board to require the union to abide by the latter's own "procedures" for fair-share refunds. Thus, on its face, California's fair-share-fee scheme is a pure union-dominated "rebate" system, one that permits a union to collect, to spend, and (unless an employee "demand[s]") to

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[11] Cal. Gov't Code § 3515.8.

[12] Cal. Gov't Code § 3515.8.

retain permanently monies to which the Constitution, as applied in *Abood,* denies it any mere possessory right in the first instance, let alone an ultimate entitlement.

Ellis, however, squarely held that such an union-controlled "rebate" system, amounting to "an involuntary loan" from dissenting employees, is procedurally improper.[13] Under *Ellis,* therefore, California's fair-share-fee scheme is invalid on its face, at least to the extent that it licenses (as it does) public-employee unions even to collect—let alone to spend and to require dissenting employees to "demand" return of—compulsory payments for non-collective-bargaining "lobbying activities" and for any "activities or causes of a partisan political or ideological nature". And, for that reason, simply perforce of *Ellis* petitioners are immediately entitled both to a permanent and *a fortiori* to a preliminary injunction against enforcement of a statute to the extent of its obvious unconstitutionality.

The Court of Appeals' attempt to avoid this result by "distinguishing" *Ellis* is palpably disingenuous. "*Ellis*", it held, "was decided on a fully developed record and controls only the remedy after a final judgment on the merits."[14] What the Court of Appeals did not acknowledge, though, is that *Ellis* involved an "union-security" statute that this Court had already held to be constitutional on its face, and had construed to prohibit the very types of union expenditures of dissenters' monies for lobbying and

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[13] —— U.S. at ——, 104 S. Ct. at 1889-90.

[14] 738 F.2d at 1086.

politics that California's statute explicitly allows here.[15] *Ellis* "was decided on a fully developed record" because the dissenting employees there first had to prove that the union was misusing a valid statute; whereas, here the statute in issue bespeaks its invalidity on its face, requiring no record more "fully developed" than judicial notice of the statute's own terms, in the light of an honest reading of *Abood* and *Ellis*.

In the Seventh Circuit, at least, the Court of Appeals' strange notions of procedural due process will find no adherents.[16] But elsewhere,[17] absent decisive intervention by this Court, the Court of Appeals' decision will encourage those intent on evading or eviscerating the procedural protections *Ellis* established, and indeed will reward them by sanctioning pure (albeit illegal) union-controlled "rebate" schemes —and the irreparable injury they cause—for as long as the wrong-doers can hold off a final judgment against themselves.

In sum, this Court should grant the petition because the Court of Appeals' decision flies in the face of *Abood* and *Ellis*.

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[15] *See ante*, note 9.

[16] Hudson v. Local No. 1, Chicago Teachers Union, 743 F.2d 1187 (7th Cir. 1984). Revealingly, the Court of Appeals completely neglected to analyze California's fair-share-fee scheme according to this Court's controlling procedural-due-process precedents, although petitioners strongly relied on due-process arguments at every stage of the litigation below.

[17] Particularly in the Third Circuit. *See* Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984), *petition for writ of certiorari pending*, No. 84-920 (U.S., filed 10 December 1984).

II. Not to enforce *Abood* and *Ellis* in this case will draw into question both this Court's willingness to police revisionism by the inferior federal courts, and its own commitment to the constitutional principles those decisions enunciated.

The stark obviousness of the legal demerits of the Court of Appeals' opinion, combined with the almost nationwide enactment of or agitation for public-employment fair-share-fee statutes not unlike California's, highlights the serious practical harm that denial of the petition would work here and hereafter.

A. No great cynicism is required to appreciate that the self-interested public-employee unions which lobbied for, and the politically venal legislature which enacted, California's fair-share-fee statute were little influenced by the substantive constitutional teaching of *Abood*, and (as respondents' defense of this case in the lower courts evidences) today think as little of the procedural teaching of *Ellis*. But no greater cynicism is necessary to extrapolate from the Court of Appeals' tortuous opinion that court's own thorough disrespect for *Abood* and *Ellis*, and its demonstrated intent *sua sponte* to "revise"—or at least "distinguish" away—the constitutional principles of those decisions, in keeping with its own peculiar (nay, perverse) ideas of what constitutes good "policy" in the field of public-employee unionism and collective bargaining.[18]

For this Court to tolerate, or even blink, such unabashed revisionism by an inferior federal court, especially where fundamental constitutional freedoms

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[18] *See* 738 F.2d at 1086, opining how "[t]he importance of legislation * * * requires" that unions "be given broad authority" to lobby with dissenters' monies.

are involved, will signal every self-styled activist on the federal bench that, if judicial anarchy is not the order of the day, at least judicial discipline is not immediately forthcoming against those who fancy themselves capable of deciding when, *or when not,* to enforce the clear mandates of this Court's decisions. If the Court of Appeals in this case can blatently declare constitutional, and deny relief against enforcement of, a statute explicitly framed in terms that unequivocally contravene both *Abood* and *Ellis* (not to mention the whole panoply of this Court's strictly procedural-due-process decisions), and then observes this Court meekly looking the other way, what else will it or any other inferior federal court (or any state court, for that matter), learn from that experience save the revolutionary lesson that defiance of this Court's rulings is not only possible, but also easy and costless?! If the Court of Appeals can state without immediate reproof that *Abood* and *Ellis* do not apply to California's fair-share-fee statute, when any thinking person can and does see the opposite on inspection, what new and further enormities will its escape from this Court's supervision stimulate it, and other inferior federal courts, to perpetrate in future cases?

But these questions answer themselves. If the Court of Appeals can succeed in rendering *Abood* and *Ellis* impotent in this case on the flimsy basis stated in its opinion, then (as the songwriter penned) in the inferior federal courts "anything goes". And this Court's opinions become precedents for itself alone.

B. Of course, the inferior federal courts, the bar, and the public could draw another inference from

denial of a writ of certiorari in this egregious case, albeit one even less flattering than that this Court is unwilling (or unable) to police the inferior federal courts when they run amok as has the Court of Appeals. An observer could conclude from this Court's inaction here that its commitment to the constitutional principles of *Abood* and *Ellis* is merely rhetorical. Indeed, for this Court so soon after deciding *Ellis* to tolerate a Court of Appeals' opinion that arrogantly defies and sets at naught that decision in a situation that compels its rigorous enforcement would evidence to anyone paying attention an insouciance for the effective protection of constitutional freedoms that logically implies an equivalent disregard for the freedoms themselves.

"What", the bar and the public would be entitled to ask were a writ denied here, "do *Abood* and *Ellis* really import, if this Court is unwilling to enforce them?" That, perhaps, this Court recognizes that no American of good will would tolerate a decision openly licensing unions to impose themselves as the political overlords of dissenting employees; that, therefore, *Abood* and *Ellis* were necessary *statements* of a principle so deeply rooted in this country's notions of fair play and individual liberty as to be undeniable by any court; but that, for reasons known to this Court alone, *Abood* and *Ellis* must remain *only* statements, so that public-employee unions can continue to enjoy abusive special privileges in fulfillment of some "policy"-judgment that the Court is embarassed to disclose to the public?

Of course, the Council hopes that no American would ever have cause to impute such dark and

devious motives to this, or any other, Court of the United States. Yet, words are one thing, and actions another.[19] And, whereas the words of *Abood* and *Ellis* refulgently promise substantive and procedural protections to non-union public employees, the actions of the Court of Appeals disdainfully prove that those promises are empty—*unless this Court intervenes now.*

In sum, considerations of its own position as supreme interpreter of the Constitution and of its integrity as ultimate protector of the liberties the Constitution guarantees compel this Court to grant the petition.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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24 January 1985

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[19] *See* J. Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government* (P. Laslett ed. 1960), § 20.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 28 of the Rules of this Court, I have served three (3) copies of the attached MOTION OF PUBLIC SERVICE RESEARCH COUNCIL FOR LEAVE TO FILE BRIEF *Amicus Curiae* IN SUPPORT OF THE PETITION FOR CERTIORARI *and* BRIEF *Amicus Curiae* on each of the following persons, by depositing said copies in a United States post office, first-class postage prepaid, addressed as indicated below:

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No. 84-1010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LYDIA B. CHAMPION, *et al.*,
Petitioners,

v.

GEORGE DEUKMEJIAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF CALIFORNIA STATE EMPLOYEES ASSOCIATION, EDMUND G. BROWN, JR., ALLEN P. GOLDSTEIN, KENNETH CORY, LEO MAYER AND CHARLES P. VALDES

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QUESTION PRESENTED

Whether the district court abused its discretion in weighing the likelihood of success on the merits, the existence of irreparable harm, and the balance of hardships to the parties, and in determining that the preliminary injunction requested by petitioners (plaintiffs below) should not issue.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. The District Court Did Not Abuse Its Discretion in Refusing to Grant a Broad Preliminary Injunction on the Basis of California's Authorization of the Use of Fair Share Fees for Limited Categories of Employment-Related Lobbying Activities	6
II. A Broad Preliminary Injunction Freeing Plaintiffs Entirely of Their Fair Share Fee Obligation is Precluded By This Court's Decisions in *Abood, Allen* and *Street*	11
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 5, 8, 11, 13, 16
Dean v. Air Line Pilots, 708 F.2d 486 (9th Cir. 1983) 14
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 4
Ellis v. Railway Clerks, —— U.S. ——, 104 S.Ct. 1883 (1984) ..... *passim*
Hudson v. Chicago Teachers Union, Local No. 1, 743 F.2d 1187 (7th Cir. 1984) 5, 14
Machinists v. Street, 367 U.S. 740 (1961) 5, 6, 13, 16
Railway Clerks v. Allen, 373 U.S. 113 (1963) 5, 16
Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984), pet. for cert. filed, No. 84-920 (Dec. 10, 1984) 5, 7, 14
School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 431 N.E.2nd 180 (1980) 5, 15

Statutes:

California State Employer-Employee Relations Act
Section 3512 2
Section 3513 ..... 2, 15
Section 3515.7 ..... 2, 3
Section 3515.8 ..... 2, 3, 6, 11, 15
Section 3516.5 10
Section 3517 10
Section 3517.6 9
Section 3517.7 9

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California State Employees Association, Edmund G. Brown, Jr., Allen P. Goldstein, Kenneth Cory, Leo Mayer and Charles P. Valdes, defendants in the district court and respondents in this Court, submit that the petition for a writ of *certiorari* should be denied and jointly file this brief in opposition.

STATEMENT OF THE CASE

In this case, the court of appeals affirmed the district court's denial of a preliminary injunction against the enforcement of those sections of the California State Employer-Employee Relations Act ("SEERA" or the "Act"), California Government Code § 3512, *et seq.*,

which authorize collection and use of "fair share fees" by respondent California State Employees Association ("CSEA").

a. Under SEERA, the employee organization elected as the exclusive bargaining representative for state employees in a bargaining unit covered by the Act may enter into an agreement with the state providing that employees in the unit shall pay a "fair share fee" that assures that the exclusive representative "receive[s] financial support from those employees who receive the benefits of [its] representation." Cal. Gov't. Code §§ 3512 and 3515.7(a)(b); App. 43a, 45a-46a. This fee may not exceed the dues paid by members and must "be used to defray the cost incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state . . ." Cal. Gov't Code § 3513(j); App. 44a.

SEERA protects objecting fee payers by providing that any state employee paying a fair share fee has the right to demand and receive a refund of the portion of the fee equal to the employee's pro rata share of union expenditures "either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization . . ." Cal. Gov't. Code § 3515.8; App. 47a. The Act excludes from this returnable amount "the costs of support of lobbying activities designed to foster policy goals and [sic] [1] collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours and other conditions of employment in addi-

[1] The "and" following "policy goals" appears to be a legislative "typographical error" in that the portion of SEERA quoted above is otherwise a verbatim copy of a parallel New Jersey statute, N.J.S.A. 34:12A-5.5(c), which instead uses the word "in". The district court noted this discrepancy. App. 3a.

tion to those secured through meeting and conferring with the state employer." *Id.*

The employee organization's administration at its fair share fee provision is subject to review by the California Public Employment Relations Board ("PERB"), the expert state administrative agency charged with administering SEERA. Cal. Gov't. Code § 3515.7; App. 47a. The employee organization collecting a fair share fee is required to keep an "adequate itemized record of its financial transactions" and to provide PERB and the represented employees with "a detailed written financial report [of these transactions] in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or comparable officers." Cal. Gov't. Code § 3515.7(e); App. 46a-47a.

b. Pursuant to § 3515.8 of the Act CSEA sets the fair share fee at an amount one dollar under its regular dues to reflect the costs of members only benefits. Murch Affidavit ¶ 18. CSEA has also instituted a refund procedure pursuant to the Act, which includes a voluntary internal remedy an objecting fee payer may use to challenge the amount of the refund provided by CSEA before filing such a challenge with PERB. Gress Affidavit, ¶ 15. Since July 1, 1983, CSEA has provided objecting employees with an immediate up-front deduction in monthly dues by an amount equal to the pro rata share of CSEA's political and ideological expenditures. App. 20a, 29a. Subsequent to the decision by the district court, CSEA has, moreover, held in an interest-bearing escrow account an additional portion of any objector's fee payment sufficient to guarantee against temporary subsidization of any activities later held to be subject to refund.

c. In the district court, petitioners—objecting fee payers in bargaining units represented by CSEA—moved for a preliminary injunction freeing them and all fee payers from any obligation to pay fair share fees, claiming that the fair share fee provisions of SEERA are constitution-

ally invalid on their face and as applied. The district court denied the motion, on the grounds that plaintiffs had demonstrated little likelihood of success on the merits of their First Amendment, due process and equal protection claims, App. 11a-19a, and that in any event the evidence in the record showed CSEA would be "seriously harmed" by such an injunction against collection of all fair share fees, App. 20a-21a. The district court also noted that the one category of expenditures on which plaintiffs focussed—CSEA's lobbying activities—totalled $154,000, only a little over three percent of the fair share fees collected. App. 21a.

The court of appeals unanimously affirmed, finding that under this Court's holdings in prior challenges to union agency-fee arrangements, including last term's decision in *Ellis v. Railway Clerks*, —— U.S. ——, 104 S.Ct. 1883 (1984), the district court did not abuse its discretion in declining to issue a preliminary injunction. App. 30a-36a.

REASONS FOR DENYING THE WRIT

The sole question raised by the petition here is whether the courts below erred in concluding that this case is *not* one in which a federal court should, in the exercise of its equitable discretion, issue a preliminary injunction. That discretion is a wide one and the standard for appellate review of the grant or denial of a preliminary injunction is correspondingly narrow: whether the district court abused its discretion in weighing the likelihood of success on the merits, the existence of irreparable harm, and the balance of hardships to the parties. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975). Such abuse of discretion questions are, except in the narrowest circumstances, inherently inappropriate for review through a writ of *certiorari* and petitioners do not come close to showing that any such circumstance is present here.

To the limited extent that the courts below needed to address on a preliminary basis the merits of petitioners' First Amendment and Fourteenth Amendment challenges to the fair share fee provisions of SEERA, their findings that petitioners had demonstrated little likelihood of success on the merits are consistent with this Court's decisions in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and in *Ellis v. Railway Clerks*, —— U.S. ——, 104 S.Ct. 1883 (1984). *See* Section I, *infra*.

Furthermore, even if petitioners had demonstrated a sufficient likelihood of success on the merits, the sweeping preliminary injunctive relief sought by petitioners is both improper under this Court's decisions in *Abood*, *Railway Clerks v. Allen*, 373 U.S. 113 (1963), and *Machinists v. Street*, 367 U.S. 740 (1961), and unjustified by the facts on the record. *See* Section II, *infra*.

Contrary to petitioners' claim, there is no conflict among the lower courts as to what type of fair share procedure is sufficient under the First Amendment and the Due Process Clause to protect objectors' rights. The court of appeals decision is fully in accord with the only other decision at all in point: *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *pet. for cert. filed*, No. 84-920 (Dec. 10, 1984). The two cases cited by petitioners—*Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187 (7th Cir. 1984) and *School Committee of Greenfield v. Greenfield Education Ass'n.*, 385 Mass. 70, 431 N.E.2d 180 (1980)—do not in fact address the issue presented by this case. *See* Section II, *infra*.

Before turning to a discussion of the points outlined above, we emphasize that petitioners have not challenged the determination of the courts below that the balance of hardships to the parties does *not* warrant issuing the preliminary injunction requested by petitioners. Indeed, petitioners could not successfully challenge this determination, because, as the district court explained, "If this court were to enjoin the collection of all fair share fees,

plaintiffs would become free riders accepting the services of CSEA but refusing to contribute to any of its costs." App. 21a. The conclusion of the courts below with respect to the balance of hardships is entirely consistent with the Court's recognition that to allow such free riding "might well interfere with . . . the unions' performance of these functions and duties which the [statute] places upon them to attain its goal of stability in the industry." *Street*, 367 U.S. at 771.

We submit that this unchallenged determination is sufficient in itself to establish that it was not an abuse of discretion to deny the preliminary injunction sought by petitioners. Nevertheless, we now proceed to consider the challenges to the decisions below that petitioners do raise and to show that petitioners are not likely to succeed on the merits and that the broad preliminary injunction they requested is improper under this Court's precedents; to show, in other words, that petitioners have not established any of the requirements for preliminary relief.

I. The District Court Did Not Abuse Its Discretion in Refusing To Grant a Broad Preliminary Injunction on the Basis of California's Authorization of the Use of Fair Share Fees for Limited Categories of Employment-Related Lobbying Activities.

California law permits the exclusive representative of a bargaining unit of state employees to finance a pro-rata share of a narrow range of employment-related lobbying with fair share fees, *viz.*, "lobbying activities designed to foster policy goals and [sic] collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer." Cal. Gov't Code § 3515.8; App. 47a.

The court of appeals considered the facial constitutionality of this statutory authorization for the limited pur-

pose of determining whether this provision of SEERA provides a separate ground for the broad preliminary injunctive relief sought by petitioners. And, consistent with the limited scope of appellate review of a district court decision denying preliminary relief, the court of appeals stated its holding with respect to this part of the Act in narrow terms: "[T]he district court did not abuse its discretion in declining to issue a preliminary injunction on this limited basis." App. 34a. This conclusion follows from the principles stated by this Court in *Ellis* and is consistent with that reached in the only other court of appeals decision to consider this question—*Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *pet. for cert. filed*, No. 84-920 (Dec. 10, 1984).

Part VI of this Court's opinion in *Ellis* sets forth the test for determining which union activities may constitutionally be financed out of agency fees over the fee payer's objection:

> At a minimum, the union may constitutionally 'expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining.' The issue is whether [the] expenses involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest. [104 S.Ct. at 1896 (citation omitted).]

Thus, the test for whether the states may in ordering their labor relations permit a union to use a portion of the money paid by each covered employee to finance a particular expenditure requires a determination first of whether the expenditure "involve[s] additional interference with the First Amendment interests of objecting employees" beyond that worked by expenditures "germane to collective bargaining," and, if it does, whether the expenditure is "nonetheless adequately supported by a governmental interest."

The court of appeals began its consideration of the constitutionality of the Act's authorization for employment-related lobbying expenditures by reciting *Ellis*' definition of expenditures "germane to collective bargaining," App. 34a, *viz.*, the definition of "the minimum [for which] the union may constitutionally 'expend uniform exactions under the union-shop agreement . . . .'" 104 S.Ct. at 1896. The court of appeals then went on to note:

> [I]n *Abood* the Court recognized that in public employment, as contrasted with private employment under the Railway Labor Act at issue in *Ellis*, the line between permissible and impermissible expenditures may be "somewhat hazier." The Court stated:
>
> > The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriation decisions might be seen as an integral part of the bargaining process.
>
> *Abood*, 431 U.S. at 236. The determination of whether certain expenditures are proper depends on the nature of the bargaining process. *See Ellis*, 104 S.Ct. at 1892; *Abood*, 431 U.S. at 236 & n.33. [App. 34a-35a.]

That court concluded that under *Ellis* and *Abood* the determination of whether the employment-related lobbying expenditures authorized by the California Act are constitutional requires consideration of the practical requirements of California's state labor relations system. App. 35a.

In making that examination, the court of appeals pointed out that in the California state sector collective bargaining, even as narrowly defined to encompass only the activity of reaching agreement at the bargaining table, necessarily requires resort to the state legislature:

> Section 3515.8 of SEERA, which plaintiffs challenge as impermissibly broad, is based on the understanding that collective bargaining in the public sector requires resort to the legislature on various employment-related questions. *See Abood*, 431 U.S. at 236. Section 3517.5 requires that the state employer-employee agreement, or memorandum of understanding, be presented "to the Legislature for determination." Cal. Gov't Code § 3517.5. The expenditure of funds required by the memorandum of understanding is dependent upon legislative approval, as is the implementation of other provisions which may be inconsistent with various state statutes. *See id.* § 3517.6. [App. 35a.]

Indeed, § 3517.6 of SEERA contemplates resort to the legislature with respect to terms of an agreement in conflict with a statutory provision:

> If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above [as an exception], those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature. [Cal. Gov't Code § 3517.6.]

And § 3517.7 of the Act provides that negotiations may be reopened with respect to any provision of an agreement not funded by the legislature. Cal. Gov't Code § 3517.7.

The court of appeals also observed that many state statutes cover terms and conditions of employment that would be subject to negotiation in the private sector, and that these statutes not only directly affect the working conditions of represented employees but also set the contours for collective bargaining:

> Because public employees work for the state, matters which are ordinarily left to direct negotiations in the private sector are covered by statute. For ex-

> ample, grievance adjustment, Cal. Gov't Code § 18714; computation of leave when there is a break in service, *id.*, § 19143; the policy of paying female workers on the principle of comparable worth to remedy great discrepancies between male and female workers' salaries, *id.* § 19827.2(a); the notice and hearing procedure when an employee's salary is changed, *id.* § 19828; and the use of hourly or day workers, *id.* § 19830, are provided by statute, but may be changed through negotiation. See generally *id.* § 3517.6 for a list of statutes affecting public employees. These statutes create a status quo from which the bargaining representatives start negotiations for their particular units. The importance of legislation affecting public employment, enacted in a forum apart from the meet-and-confer sessions authorized by statute, Cal. Gov't Code § 3517, requires that public employee representatives be given broad authority to protect their members' interests before the legislature. [App. 35a-36a.]

SEERA requires that the state employers and the Governor consider the views of the state employees' exclusive representatives with respect to terms and conditions of employment in formulating legislative proposals and state policies that affect those terms and conditions. Cal. Gov't Code §§ 3516.5 & 3517.

The court of appeals' review of public sector labor relations in California makes clear that the employment related lobbying expenditures authorized by the Act are among the "expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union" representing California state employees, *Ellis*, 104 S.Ct. at 1892, and, thus, that these expenditures are within the "minimum [for which] the union may constitutionally 'expend uniform exactions under the union-shop agreement . . . ,'" *id.* at 1896. Moreover, as the court of appeals' opinion also demonstrates, the authorization for such expenditures is "adequately supported by a governmental interest," *id.* at 1896, in

hearing from the representatives of state employees on employment-related matters.

Petitioners' discussion of the Act's employment-related lobbying provision does not take issue with the court of appeals' assessment of the practical requirements of California's state labor relations system. Pet. 20-21. Nor do petitioners even cite this Court's decisions in *Ellis* and *Abood* in their review of this provision, much less challenge the court of appeals' application of these precedents. Instead, petitioners address the lobbying issue in only the most abstract and general terms, asserting that the court of appeals "never addressed the values of the rights impacted or nature of the restrictions imposed by the statutory scheme." Pet. 20. This assertion is patently incorrect, as the court of appeals' careful application of *Ellis* and *Abood* to the California labor relations system (just outlined at pp. 8-10 *supra*) demonstrates. App. 33a-36a.[2]

II. A Broad Preliminary Injunction Freeing Plaintiffs Entirely of Their Fair Share Fee Obligation is Precluded By this Court's Decisions in *Abood, Allen* and *Street.*

a. The court of appeals began its discussion of why a preliminary injunction is improper here from the following basic premise:

> In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Court recognized

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[2] Petitioners mischaracterize the Act by suggesting that the statute would allow an objector's fees to be used for such political purposes as contributions to candidates or other partisan activities. *See, e.g.*, Pet. 5 n.3 & 10. It is clear from the terms of the Act that an exclusive representative is not allowed to use an objector's fees for such purposes. Cal. Gov't Code § 3515.8; App. 47a. Nothing said or done by either the court of appeals or the district court is to the contrary. In any event, even were it not clear from the face of the Act that such partisan political expenditures are not permitted over objection, the scope of expenditures permitted by the Act should be determined in the first instance by the California courts. *See Abood*, 431 U.S. at 232-233.

that funds paid to the union by objecting employees, compelled pursuant to the Railway Labor Act, 45 U.S.C. § 152, Eleventh, could only be used for limited purposes. The Court held, however, that an injunction against all such compelled payments was unjustified. It said:

> Restraining the collection of all funds from the appellees [objecting employees] sweeps too broadly, since their obpection is only to the uses to which some of their money is put. Moreover, restraining collection of the funds . . . might well interfere with the appellant unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry.

367 U.S. at 771. In *Allen*, the Court was even more emphatic. It stated that "lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, *dissenting employees* (at least in the absence of special circumstances not shown here) *can be entitled to no relief until final judgment in their favor is entered*" 373 U.S. at 120 (emphasis added). *See* also *Abood*, 431 U.S. at 241 ("For all the reasons outlined in *Street*, the court was correct in denying the broad injunctive relief requested"). . . . [App. 32a-33a.]

In affirming the district court, the court of appeals gave full consideration not only to the foregoing authorities, all of which were relied on by the district court, but also to this Court's intervening decision in the *Ellis* case. App. 33a-36a. In *Ellis* this Court held that a "pure rebate approach," *viz.*, one that incorporates neither of the "acceptable alternatives" of "advance reduction of dues" or "interest-bearing escrow accounts," "reduces but does not eliminate the . . . violation" of an objector's rights. 104 S.Ct. at 1890. As the court of appeals recognized that holding is of no aid to petitioners in this case.

First, since July 1, 1983, shortly after this lawsuit commenced and before the district court ruled on the

preliminary injunction, CSEA has provided objectors with one of the "acceptable alternatives" suggested in *Ellis*, namely an "advance reduction of dues." App. 20a, 29a. CSEA has also, subsequent to the district court's ruling, provided objectors with the additional protection approved in *Ellis* by placing a portion of their reduced fee payments in "interest-bearing escrow accounts," *id.* at 1890, pending determination of whether any refund is due.[3] Second, as the court of appeals points out, *Ellis* does nothing to undermine the teaching of *Abood*, *Allen* and *Street* that a *preliminary injunction* entirely relieving objectors of their obligation to contribute financial support to their representative is improper. App. 36a.

Abood is particularly pertinent, because that case like this one involved a facial constitutional challenge, there to a Michigan statute which had been construed by the state court to allow unions to use an objector's fee payments to finance partisan political activity. 431 U.S. at 232-233. Nevertheless, this Court held that the Michigan court was correct in denying broad injunctive relief, *id.*, at 240-241, reiterating the point made in *Street*, that "[s]ince . . . [*Railway Employes' Dept. v.*] *Hanson*[, 351 U.S. 225 (1956),] had established that the union-shop agreement was not unlawful as such, . . . to enjoin enforcement would '[sweep] too broadly,'" *id.*, at 238. If the Michigan court in *Abood* was correct in denying an injunction that would free the *Abood* plaintiffs entirely of their contractual obligation to financially support union representation under a statute that provided no protection for objecting fee payers, the district court below was surely correct in denying a preliminary injunction relieving the plaintiffs here of their fair share

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[3] Neither of the courts below reached the question of whether CSEA's advance reduction of objectors' fees and the interest-bearing escrow account are sufficient to completely eliminate any violation of plaintiffs' rights, as these are factual determinations properly made on a fully developed record after a trial on the merits.

fee obligation under a statute that on its face and as applied provides substantial protection to objectors.

b. Petitioners erroneously assert there is a conflict between the decision of the courts below and those of other lower courts. In fact, the only other court of appeals decision to consider the question of preliminary relief presented here is completely consistent with the decision below. *Robinson v. New Jersey*, 741 F.2d 598, 615 (3d Cir. 1984), *pet for cert. filed*, No. 84-920 (Dec. 10, 1984). *See also Dean v. Air Line Pilots*, 708 F.2d 486, 487-488 (9th Cir.), *cert. denied*, 104 S.Ct. 490 (1983).

Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187 (7th Cir. 1984), cited at Pet. 16, does not address the issue of preliminary relief at all, much less hold that a preliminary injunction freeing employees of their obligation to contribute financial support to their union is proper. In *Hudson* the district court declined to rule on the plaintiffs' refund claim deferring instead to a union internal rebate procedure. 573 F. Supp. 1505, 1521-22 (N.D. Ill. 1983). The *Hudson* court of appeals disagreed, concluding that an internal union procedure that does not provide for a final determination by a neutral public body cannot be a basis for a federal court's refusal to hear the plaintiffs' claim. The court of appeals in *Hudson* did not order any preliminary relief, but merely remanded for further proceedings consistent with its opinion. 743 F.2d at 1194-97.[4] In the instant case the district court did *not* decline to rule on petitioners' claim for preliminary relief pending resort to CSEA's internal refund procedure, and the court of appeals expressly reserved the question of the adequacy of CSEA's system to fully protect petitioners' rights, App. 36a. Rather, the courts below fully considered petitioners' claims and ruled that those claims did not warrant the preliminary injunction requested.

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[4] Moreover, in *Hudson* the primary deficiency found by the Seventh Circuit in the union's internal system was that the system provided for neither an administrative hearing before a neutral body

In *School Committee of Greenfield v. Greenfield Education Ass'n*, 385 Mass. 70, 431 N.E.2d 180 (1982), cited at Pet. 17, the Massachusetts Supreme Judicial Court construed the Massachusetts agency shop statute as authorizing objecting employees to pay their contested agency fee into an escrow account pending an initial administrative determination of the appropriate amount. 431 N.E.2d at 189-190.[5] Far from approving the sort of broad preliminary relief sought by the plaintiffs here, the Massachusetts court directed the state agency holding the contested fees to make a prompt preliminary determination of the amount clearly payable to the union and to turn that amount over to the exclusive representative without delay. 431 N.E.2d at 190 n.9. As the Massachusetts court noted, "The necessity of protecting the rights of dissenters is not a justification for allowing an association to be 'crippled by nonaccess to that portion of the fee which will be used for collective bargaining, contract administration and grievance adjustment.'" 431 N.E.2d at 189. The district court below found that the preliminary injunction sought by petitioners would cripple CSEA in just this way. App. 20a-21a.

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nor a judicial review proceeding. 743 F.2d at 1196. SEERA, contrary to petitioners' mischaracterization of that Act as allowing CSEA "unbridled discretion with respect to fees," Pet. 10, *does* provide that "[t]he [Public Employment Relations Board] may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section." Cal. Gov't Code § 3515.8; App. 47a. *See id.* § 3513(g).

[5] In addition, since *Greenfield* is a statutory construction case, there is nothing in that opinion suggesting that the United States Constitution requires every state to follow the same approach as Massachusetts in protecting the rights of objectors. Indeed, such a holding would be contrary to this Court's holding in *Ellis* that an "advance reduction of dues" or "interest-bearing escrow accounts" are among the "acceptable alternatives" for protecting those rights. 104 S.Ct. at 1890.

In sum, this Court has three times addressed the question of preliminary relief in cases of this sort, and each time has clearly held that a preliminary injunction entirely freeing objectors of any obligation to provide financial support to their exclusive representative is not an appropriate remedy. *Abood*, 431 U.S. at 240-242; *Allen*, 373 U.S. at 119-120, 122; *Street*, 367 U.S. at 771-772. Under these precedents, and particularly in light of the protections given objectors by SEERA and by CSEA's advance reduction and escrow systems, the courts below were undoubtedly correct in denying the petitioners the preliminary injunction they requested relieving them of their entire fair share fee obligation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 84-1010

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

LYDIA B. CHAMPION, et al.,

Petitioners,

v.

GEORGE DEUKMEJIAN, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the district court committed abuse of discretion or clear error in applying existing law and denying the preliminary injunction?

LIST OF PARTIES TO THE PROCEEDING

(SUP.CT. R. 34.2)

The list of petitioners set forth in the Petition for Writ of Certiorari is correct. The list of respondents is incorrect, in that Michael Frost, in his capacity as then-Director of the Department of Personnel Administration, was substituted as a party in place of original defendant and named respondent Dennis Batchelder. (Petn. for Writ of Cert., App. A-1, p. 3a.)

Michael Frost is no longer the Director of the Department of Personnel Administration. Effective December 17, 1984, the Department of Personnel Administration Interim Director is James Mosman.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING . . ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION

1. There Are No Special and Important Reasons Therefor. . . 5

2. The Petition Does Not Warrant The Exercise of This Court's Extraordinary and Discretionary Jurisdiction. 7

   A. There is no conflict in decisional law. 7

   B. There is no overriding national issue. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Board of Education (1977) 431 U.S. 209 . . . 6,9

Ellis v. Brotherhood of Railway Clerks (1984) 104 S.Ct. 1883 . . 5,6,9

Hudson v. Chicago Teachers Union (7th Cir. 1984) 743 F.2d 1187 . . 7,8,9

NLRB v. Pittsburgh S.S. Co. (1951) 340 U.S. 498 6

Robinson v. State of New Jersey (3rd Cir. 1984) 741 F.2d 598 . . 7,8,9

Codes

Cal. Government Code § 3513(j) 2
§ 3515 2
§ 3515.7 2
§ 3515.8 2

Rules of Court

Supreme Court rule 17 5
17.1 5

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STATEMENT OF THE CASE

The facts and procedural history of this case are set forth in the opinion of the courts below. (Petn. for Writ of Cert., App. A-1, pp. 2a-5a, 25a; App. A-2, pp. 27a-30a, 37a.) The State Employer-

Employee Relations Act was enacted by the California Legislature in 1977, effective July 1, 1978, and established a system of collective bargaining and representational rights within state civil service employment. The statute provided for recognition of employee organizations as exclusive representatives of appropriate units and for the right of state employees to refrain from participation in employee organizational activities, subject to certain forms of organizational security. (Cal. Gov. Code §§ 3515, 3515.7; Petn. for Writ of Cert., App. B-2, p. 45a.) Effective January 1, 1983, the statute was amended by the Legislature to specifically allow the negotiation of "fair share fees" as permissible forms of organizational security. (Cal. Gov. Code §§ 3513(j), 3515, 3515.7, 3515.8; Petn. for Writ of

Cert., App. B-2, pp. 44a-47a.)

The first payroll deduction of "fair share fees" from nonmember employee paychecks pursuant to the statutes was made on February 1, 1983, and all employees were notified of their right to demand and receive a pro rata rebate of the portion of fees used for "partisan political or ideological causes only incidentally related to the terms and conditions of employment." (Petn. for Writ of Cert., App. B-2, p. 47a.) Since July 1, 1983, respondent California State Employees Association has eliminated at the outset this pro rata portion from the "fair share fee" deduction of objecting employees' paychecks, rather than requiring such employees to wait for a rebate.

The district court denied the petitioners' (plaintiffs-appellants) preliminary injunction against deduction, collection and use of any portion of employees' wages as fair share fees in a 25-page memorandum opinion relying squarely upon precedent in the circuit. The district court also denied petitioners' motion for class certification and respondents (defendants-appellees) motion for abstention. Only the denial of preliminary injunction was appealed to the Ninth Circuit Court. (Petn. for Writ of Cert., App. A-1, pp. 2a-25a.)

The court of appeals reviewed the district court action denying preliminary injunction under the abuse of discretion/clear error standard of review. The court carefully considered the recently issued

Supreme Court holding in Ellis v. Brotherhood of Railway Clerks (1984) 104 S.Ct. 1883, in evaluating the denial of preliminary injunction, given the issues of the underlying suit, challenging the propriety of union expenditures and the constitutionality of the statutes. The court of appeals affirmed the denial of the preliminary injunction. (Petn. for Writ of Cert., App. A-2, pp. 27a-37a.)

REASONS FOR DENYING THE PETITION

I

There Are No Special and Important Reasons Therefor.

A review of the petition indicates that it presents no "special and important reasons" within the meaning of Supreme Court rule 17 that would justify the grant of a writ of certiorari in this matter.

(Sup.Ct. R. 17.1.) In the case of NLRB v. Pittsburgh S.S. Co. (1951) 340 U.S. 498, this Court observed that certiorari "is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarassing conflict of opinion and authority between courts of appeals." (340 U.S. at 502.) No such circumstances are presented by the instant petition. Rather, the lower courts merely followed Ninth Circuit precedents, as well as the Supreme Court's holdings in Abood v. Detroit Board of Education (1977) 431 U.S. 209; and Ellis v. Brotherhood of Railway Clerks, supra, 104 S.Ct. 1883.

II

The Petition Does Not Warrant The Exercise Of This Court's Extraordinary and Discretionary Jurisdiction.

A. There is no conflict in decisional law.

Petitioners raise no new arguments that were not considered by the court of appeals in affirming the district court's denial of preliminary injunction and in denying a petition for hearing/rehearing en banc. (Petn. for Writ of Cert., App. A-3, p. 39a.) Both the Seventh Circuit Court's decision in Hudson v. Chicago Teachers Union (7th Cir. 1984) 743 F.2d 1187; and the Third Circuit Court holding of Robinson v. State of New Jersey (3rd Cir. 1984) 741 F.2d 598, were supplied and briefed to the court of appeals prior to its decision denying rehearing. The

Hudson decision, upon which petitioners so strongly rely in asserting a purported conflict in decisional law among the courts of appeals, validated the Illinois "agency fee" statute against constitutional attack. The Robinson holding, like the holding of the lower courts in this cause, upheld the constitutionality of the "representational fee" statutory schemes of the states of New Jersey and California, respectively. Since all of these statutes were found by the courts of appeals to be constitutional, there is no conflict in the decisions of the appellate courts on the subject of "fair share" fees.

B. There is no overriding national issue.

Moreover, a review of the Robinson and Hudson decisions, the appellate court ruling herein, and this Court's rulings in Abood v. Detroit Board of Education, supra, 431 U.S. 209; and Ellis v. Brotherhood of Railway Clerks, supra, 104 S.Ct. 1883, demonstrate that the validity of "fair share," "representational" or "agency" fees depends upon analysis of the specific language of the enabling statute and the particular scheme for deduction, collection and use of such fees. Consequently, any decision by this Court in the instant case would have a very specialized effect, since it would apply only to the particular "fair share" fee under the California statute. Considering the enor-

mous number of urgent national issues requiring decision by this Court, the very limited national effect of a decision in this case does not justify the time the Court would have to devote to make the decision.

CONCLUSION

Based upon the foregoing arguments and authorities, these respondents pray that the Petition for Writ of Certiorari

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to the United States Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

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Respondents.

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases *Page*

Albermale Paper Co., v. Moody, 422 U.S. 405 (1975) 2

Bose Corp. v. Consumer Union of U.S., 104 S. Ct. 1949 (1984) 1, 3-4

Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983) 3

Ebel v. City of Corona, 698 F.2d 390 (9th Cir. 1983) 3

Ellis v. Railway Clerks, 685 F.2d 1065 (9th Cir. 1982), *rev'd in part*, 104 S. Ct. 1883 (1984) 5, 6

Hudson v. CTU, 573 F. Supp. 1505 (N.D. Ill. 1983), *rev'd*, 743 F.2d 1187 (7th Cir. 1984) 5. 6

In re Primus, 436 U.S. 412 (1978) 3

Lopez v. Heckler, 725 F.2d 1489 (9th Cir. 1984) 1

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 2

Mitchum v. Foster, 407 U.S. 225 (1972) 3

Perry v. Local Lodge 2569, 708 F.2d 1258 (7th Cir. 1983) 6

TABLE OF AUTHORITIES-continued

Cases *Page*

School Committee of Greenfield v. Greenfield Education Ass'n, 385 Mass. 70 (1982) 4, 5, 6

United Church v. Medical Center Com'n, 689 F.2d 693 (7th Cir. 1982) 3

Statutes

28 U.S.C. § 1343(3) & (4) 2

42 U.S.C. § 1983 2

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REPLY BRIEF FOR THE PETITIONERS

Respondents (Opp., 4) argue that this case is merely a case of abuse of equitable discretion. They claim such cases are "inherently inappropriate for review." However, the settled law is that "application of an incorrect legal standard for preliminary relief and misapprehension of the law with regard to the underlying issues in the case are grounds for reversal." *Lopez v. Heckler*, 725 F.2d 1489, 1497 (9th Cir. 1984). The court reviews legal issues *de novo*. *Id.* at 1498. In a case "raising First Amendment issues," the court "has an obligation" to " 'make an independent examination of the whole record.' " *Bose Corp. v. Consumer Union of U.S.*, 104 S. Ct. 1949, 1958 (1984). The Court of Appeals failed this latter obligation, applied an incorrect legal standard for preliminary relief and misapprehended the law with regard to the underlying issues. Its action conflicts not only with the constitu-

tional principles enunciated by this Court, the Seventh Circuit and Supreme Judicial Court of Massachusetts, but also with the congressional purpose in 42 U.S.C. § 1983.

The Court of Appeals misapplied Railway Labor Act cases to foreclose preliminary relief (Opp., 12, 16) for substantial claims under the Civil Rights Act of 1871, 28 U.S.C. § 1343(3) & (4) and 42 U.S.C. § 1983. It "applied an incorrect legal standard" which indeed flouts the congressional purpose to entrust protection of fundamental rights to the equitable powers of the federal courts. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416-17 (1975).[1]

In addition the Court of Appeals "misapprehen[ded] the law with regard to the underlying" First and Fourteenth Amendment issues. It can hardly be doubted that ongoing statutory deductions for union political and ideological purposes from non-consenting non-members, implemented under the sole protection of a union-

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[1] In § 1983 Congress aimed to protect against "the deprivation of any rights, privileges, or immunities secured by the Constitution" and to authorize "a proceeding for the enforcement of those rights." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545-52 (1972). In this case the lower courts were required to exercise their power to further these "transcendent legislative purposes" and to apply remedial "standards consistent with those purposes." *Albermarle Paper* at 417. The Railway Labor Act cases are inapposite to this case for the reasons stated in the Pet., 7-8 & n.6, 19; nor do they address the preliminary relief issues here. Petitioners moved for preliminary relief on grounds that the *statute facially* and as applied violated "fundamental rights to free speech and association, to equal protection, and procedural due process of law" and asked the court to restrain deduction, retention and/or expenditure of amounts from their wages "*for so-called* fair share fees." ER, 61-62.

dominated rebate system, raises questions touching the very core of constitutional guarantees. If there is some likelihood Petitioners' claims will ultimately prevail, there would be no remedy for the rights lost or harm done when they do prevail. Protection of the public's interest and effective enforcement of Petitioners' rights, therefore, demanded injunctive relief "to prevent great, immediate and irreparable loss" of those rights, *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), pending entry of "final judgment in their favor." The decision below defies these basic principles. *Compare, Ebel v. City of Corona*, 698 F.2d 390, 392-93 (9th Cir. 1983) (ordering the district court to issue a preliminary injunction pending trial on factual issues to protect against zoning law's effect on adult bookstore); *United Church v. Medical Center Com'n*, 689 F.2d 693, 698-701 (7th Cir. 1982) (ordering the district court to issue preliminary injunction after finding legal error in leaving plaintiff's rights to the irreparable harm of an inadequate regime of due process); *Cate v. Oldham*, 707 F.2d 1176, 1186-90 (11th Cir. 1983) (ordering preliminary injunction to protect First Amendment right to petition, and noting other circuits hold that to "the extent that an infringement of First Amendment rights is shown" then "irreparable injury justifying preliminary injunctive relief is presumed").

The Court of Appeals also relied upon assertions of fact similar to those presented in the Opp Br., 3, 13. *Compare*, App. 29a, 33a, 36a. To that extent, the Court of Appeals looked improperly to the arguments of appellate counsel, *see In Re Primus* 436 U.S. 412, 434 n.27 (1978) and failed its duty to examine "the whole record,"

Bose Corp. supra.[2]

Respondents (Opp. Br., 15) advance the argument that *School Committee of Greenfield v. Greenfield Education Ass'n*, 385 Mass. 70 (1982) "is a statutory construction

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[2] (1) The record does not support the allegation "that CSEA has also instituted a refund procedure pursuant to the Act." The Gress Affidavit, filed two months after this suit commenced, in opposition to the motion for preliminary injunction, states that "CSEA's Board of Directors has directed staff to develop a recommended internal rebate procedure and report back to the board at its August 6-7, 1983 meeting." ER, 256. (2) The record does not support the allegation that CSEA "has provided objecting employees with an immediate up-front deduction in monthly dues by an amount equal to the pro rata share of CSEA's political and ideological expenditures." *Compare*, App., 33a ("the amount collected no longer includes amounts for *partisan* political purposes clearly subject to refund under the statute"). The record reflects that CSEA initially refunded that "portion [of fees, 85¢/month] withheld for CSEA'S *political action fund* (PAC) following the December 31 close of the fiscal year," in accordance with Cal. Code § 3515.8. Addendum to App. Br., 48. After the suit commenced, Controller Gress stated in an affidavit, "on June 16, 1983 CSEA officers adopted the following procedures: 'Upon receipt of a written objection from a fair share fee payer who does not agree to make a voluntary contribution to the CSEA political action fund, we will cease deduction of the political action fund amount until otherwise notified and promptly refund any amount that may have been retained since receipt of the written objection.' " ER, 430. (3) Nothing in the record reflects that CSEA has held anything "in an interest-bearing escrow account." And, it would be remarkably clairvoyant if CSEA could escrow an amount "sufficient to guarantee against temporary subsidization of any activities *later held* to be subject to refund." (4) The demand and return procedure "established by the recognized employee organization" under § 3515.8 is hardly "voluntary." It is the employees' only procedure or recourse: an exclusive statutory "right to demand" a rebate from CSEA with review in a state agency to determine whether the refund properly included union expenditures "in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment." App., 47a. The statute precludes suit against the state regarding fees. App., 46a. The contract precludes grievances regarding fees. ER, 504.

case" and immaterial to the constitutional issues decided below. But *IAM v. Street* was also a "statutory construction case," *Greenfield* at 79 n.5, and the Court of Appeals relied heavily upon it. Since *Greenfield* involves a government employer and facial, due process questions, it would appear to be far more on point. In contrast, the cases under the Railway Labor Act involved the *applied scope* of a union's authority to compel fee payments. (As under the Railway Labor Act, the Massachusetts system involved consensual payments and a request to discharge, *Greenfield* at 72-73.) In this case the legislature accepted and enacted, and the governor implemented, Pet., 5-6, that very procedure which in *Greenfield* (and New Jersey, Opp. Br., 2 n.1) the unions offered as constitutionally adequate. The attorney general and unions argued that employees must pay first and then exhaust the rebate procedure before obtaining a government determination of a valid assessment. *Id.* at 77-78.[3] The Supreme Judicial Court held that process to be constitutionally inadequate, *id.* at 82. And, in *Ellis v. Railway Clerks*, this Court held that same process to be inadequate as a remedy, rendered upon a *statutory violation, determined after a full trial to prove permissible expenditures.* 104 S. Ct. 1883, 1890 & n.7 (1984).

In applying the law to "[t]he merits" of Petitioners' claims the district court relied (App. 10a-15a) exclusively upon the circuit's decision in *Ellis*, 685 F.2d 1065, 1069-70. Thus, it held the instant statutory rebate "constitu-

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[3] In *Greenfield* at 72, 77 as well as in *Hudson v. CTU*, 743 F.2d 1187, 1190 (7th Cir. 1984), the government required payment or authorized collection *only for the purpose* of sharing "the costs of the union's efforts to negotiate and administer the collective bargaining contract" with the government employer.

tionally sufficient to override both due process and First Amendment concerns." Despite this Court's rejection of the circuit's remedial and substantive rulings in *Ellis*, 104 S. Ct. at 1890-92, the Court of Appeals decided to leave Petitioners' interests to the protection of the statutory rebate remedy and approved (App. 32a-35a) the broad collection authorization of § 3515.8.

Respondents (Opp. Br., 5-7, 14-15) deny conflict exists between the action below and the decisions of this, or other, Court[s]. However, in *Perry v. Local Lodge 2569*, the Seventh Circuit decided that a preliminary injunction was necessary to protect First Amendment rights until "a constitutionally permissible mode of [agency fee] payment" existed. 708 F.2d 1258, 1262 (1983). In *Hudson* the Seventh Circuit dealt specifically with a 42 U.S.C. § 1983 claim for injunctive relief for violation of the right to procedural due process, 573 F. Supp. at 1515. That court reversed the denial of injunctive relief which the district court, 573 F. Supp. at 1512, 1521, predicated upon the existence of a union rebate to satisfy due process of law. 743 F.2d at 1194. And, in *Greenfield*, only *after* holding "that the *statutory right* of the organization to the *permissible amount* is *outweighed by the potential* that the impermissible amounts will be used, *even temporarily*, in violation of the dissenting teachers' First Amendment rights," and only *after* requiring the union to prove the legitimacy of an assessment before a neutral, government tribunal subject to judicial review, *id.* at 82-83, 85, did the court remark about the union's access "to that portion of the fee which will be used for collective bargaining." It is inconceivable that Respondents would read that remark to justify the action below.

CONCLUSION

The issues raised in this case are of extreme importance and immediacy. The state's and lower court's actions are inflicting constitutional wrongs upon the individual and society as a whole. For all the foregoing reasons, and those presented in the Petition, this Court should grant the Petition.

Respectfully submitted,

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